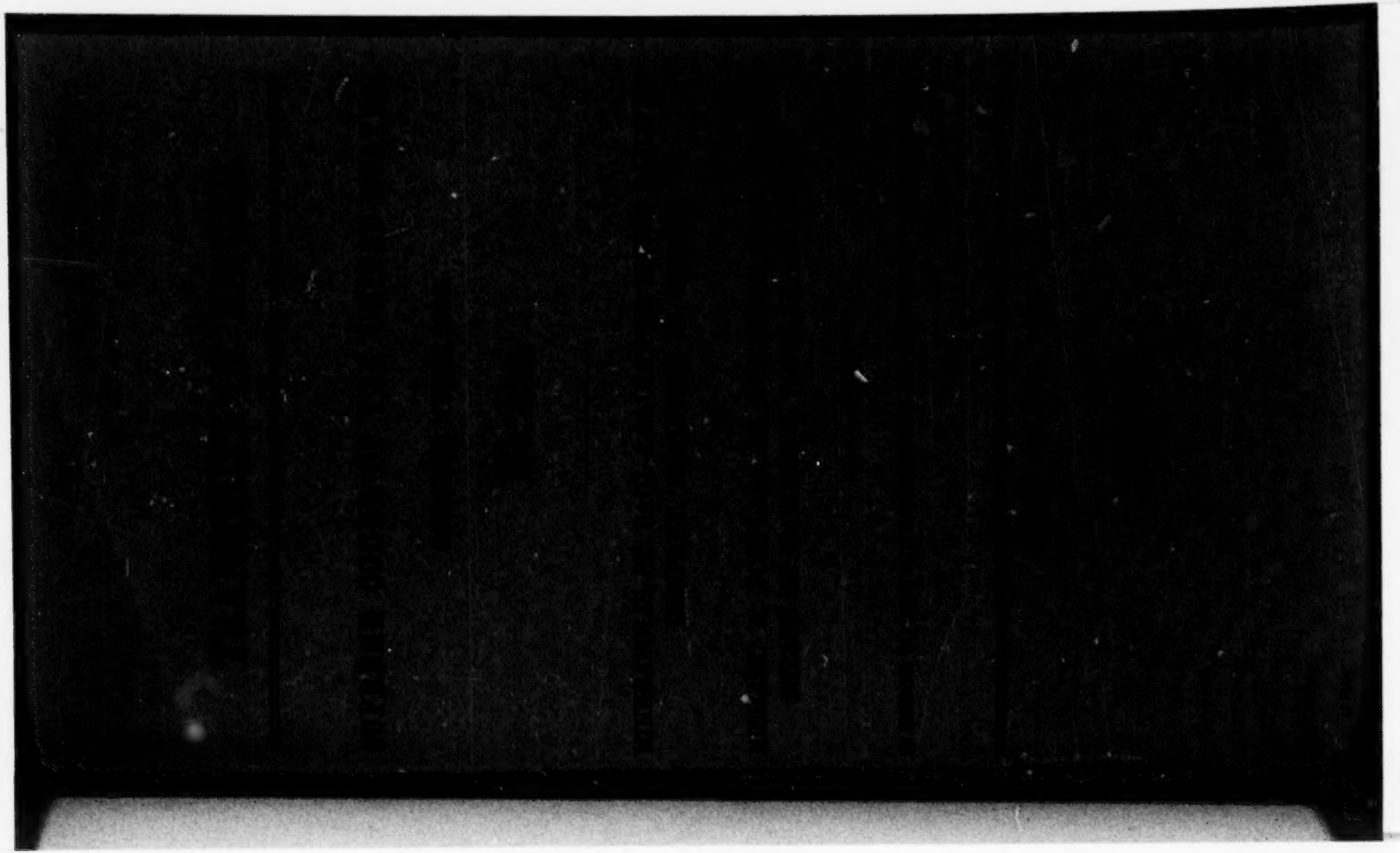

(23,804)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 223.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

MICHAEL A. POPPLAR, AS ADMINISTRATOR OF THE ESTATE OF RICHARD S. POPPLAR, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

INDEX.

	Original.	Print
Caption	1	1
Transcript from second judicial district court	2	1
Summons	2	1
Complaint	3	2
Answer	6	4
Reply	8	5
Case on appeal	9	5
Evidence for plaintiff	10	6
Testimony of Ludwig M. Harmsen	10	6
John S. Kornell	13	8
Michael Poppler	25	18
Plaintiff rests	31	22
Motion to dismiss	31	22
Evidence for defendant	32	22
Testimony of Duncan Leach	32	22
Ross C. Bethel	59	42
Charles A. Benson	61	43
Wm. H. Wentz	67	48
Peter Rooth	76	54
William C. Ranous	78	56
James S. Conroy	80	57
Duncan Leach (recalled)	83	60

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 14, 1914.

	Original.	Print
Defendant rests	87	63
Motion for verdict for defendant	87	63
Judge's charge to jury	88	63
Verdict	96	68
Defendant's Exhibit No. "2"—Acknowledgment of circular No. 176 by Popplar, May 12, 1908	97	68
Defendant's Exhibit No. "3"—Copy of circular No. 176 regarding rule 42, M., St. P. & S. S. M. Ry	97	68
Notice of proposed case	98	69
Stipulation settling case	98	69
Order settling case	99	70
Motion for new trial	100	71
Order denying motion for new trial	102	72
Memorandum opinion, Dickson, J.	104	73
Notice of appeal	105	74
Clerk's certificate	106	74
Record filed in supreme court	107	75
Assignment of errors	108	75
Syllabus	111	77
Opinion, Hallam, J.	114	78
Judgment roll	122	82
Order for judgment	123	83
Minutes of argument	125	84
Judgment of supreme court	127	84
Judgment of district court	131	86
Notice of appeal	133	87
Certificate of clerk of district court	134	88
Order affirming judgment	136	89
Judgment	137	89
Order for judgment	139	90
Clerk's certificate	141	91
Bond on writ of error	143	92
Petition for writ of error	145	93
Order allowing writ of error	151	96
Certificate of lodgment	152	97
Writ of error	153	97
Assignments of error	156	98
Citation and service	163	103
Clerk's return to writ of error	165	104

1 STATE OF MINNESOTA,
County of Ramsey:

District Court, Second Judicial District.

MICHAEL A. POPPLAR, Adm'r, etc.,
vs.
MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY.

Hon. Frederick N. Dickson, J.

Samuel A. Anderson, P'ffs' Atty.
John L. Erdall and M. D. Munn, Def't's Att'ys.

Record of the Testimony and Proceedings Had Upon the Trial.

Return on Appeal.

O. HESS, *Reporter.*

Filed Sept. 20, 1912.
I. A. CASWELL, *Clerk.*

2 STATE OF MINNESOTA,
County of Ramsey:

District Court, Second Judicial District.

MICHAEL A. POPPLAR, as Administrator of the Estate of Richard S. Popplar, Deceased, Plaintiff,
vs.
MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, Defendant.

The State of Minnesota to the Above Named Defendant:

You are hereby summoned and required to answer the complaint of the plaintiff in the above entitled action, which complaint is hereto attached and herewith served upon you, and to serve a copy of your answer to said complaint upon the undersigned at his office, 604 New York Life Building, St. Paul, Minnesota, within
3 twenty days from the date of the service of this summons upon you, exclusive of the day of such service, and if you fail to answer said complaint within the time aforesaid, plaintiff will apply to the Court above named for the relief demanded in the complaint and for his costs and disbursements herein.

SAMUEL A. ANDERSON,
Attorney for Plaintiff, 604 New York Life Bldg., St. Paul, Minn.

STATE OF MINNESOTA,
County of Ramsey:

District Court, 2nd Judicial District.

MICHAEL A. POPPLAR, as Administrator of the Estate of Richard S. Popplar, Deceased, Plaintiff,
vs.
MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, Defendant.

The plaintiff for cause of action herein alleges:

I.

That the defendant now is, and during all the times hereinafter mentioned has been, a railway corporation organized and existing under and by virtue of the laws of the State of Minnesota; that during all of said times the defendant was a common carrier engaged in interstate commerce by railroad and in connection with said business owned, maintained and operated a line of railway in and through the states of Minnesota and North Dakota, together with the usual locomotive engines, freight and passenger cars and other railway equipment.

II.

That on the 6th day of Sepember, 1909, the deceased was in the employ of the defendant for hire as a railway brakeman; that he was then and there engaged in the performance of his duties as such brakeman upon and about defendant's trains, engines and cars being moved and propelled along and over defendant's rail-
4 way tracks at a place or station on defendant's said railway called Mahnomen, in said State of Minnesota, which tracks constituted a railway yard and formed a part and were used in connection with defendant's said interstate railway; that on said 6th day of September, 1909, in said railway yard at said Mahnomen, the deceased was engaged in the due and proper performance of his duties in and about certain switching operations then and there being conducted by the defendant; that during the progress of said switching operations it became and was necessary to uncouple certain cars then and there being switched and distributed and made up into a train; that the deceased, in the proper performance of his duties attempted to make such uncoupling in the usual and customary manner, to-wit, by use of the pin lifter, so called, but was unable to so uncouple said cars; that he, thereupon, went in between said cars, as it was his duty to do, for the purpose of making said uncoupling; that while deceased was in between said cars endeavoring to effect such uncoupling and while proceeding with said cars which were moving slowly, his foot was caught in between the main rail and a guard rail of the said railway tracks and he was thereby thrown down and so badly injured, crushed and mangled that he died

within a short time thereafter solely on account thereof; that the cars between which deceased was caught and injured were in use, and had been in common and regular use, upon the lines of railway of the defendant engaged in moving and transporting interstate commerce and traffic, and that they were at the time of said accident being used in connection with other cars of the defendant in the making up and distribution of trains for the purpose of transporting and moving interstate commerce and traffic over the de-
5 fendant's said line of railroad; that the coupling appliances on said cars were then and there in a defective condition in that the pin lifter would not work and said cars could not be uncoupled without the necessity of going between the same; that the coupling pin in the automatic coupling device on one of said cars was bent, worn and defective and would not respond to the pin lifter thereto attached and that the end of the other of said cars projected over and out to such an extent as to make and render it impossible to operate the pin lifter thereon and so uncouple said cars; that said guard rail was not properly, or at all, blocked, filled and guarded and was in an unsafe and dangerous condition at all of said times; that all of said defective appliances and unsafe and dangerous conditions aforesaid were then and there due to the negligent, careless and wrongful conduct and omissions of the defendant and that said defective appliances and dangerous conditions were the sole cause of said accident and the death of said decedent.

III.

That at the time of said accident the deceased was twenty years of age, strong and able-bodied and earning and capable of earning an average wage of $100.00 per month; that he left him surviving this plaintiff, his father, and his mother, who are his next of kin and sole heirs at law and for whose benefit this action is brought.

IV.

That before the commencement of this action the plaintiff was duly appointed the administrator of the estate of said deceased in and by the County Court in and for the County of Cass and State of North Dakota; that letters of administration thereon were
6 duly issued to him by said court, a duly authenticated copy of which letters has been duly filed with the Probate Court in and for the County of Ramsey, State of Minnesota, as by law in such case made and provided.

V.

Plaintiff further alleges that by reason of the negligent, careless and wrongful acts and omissions of the defendant as hereinbefore stated the said parents of said decedent have been damaged in the sum of twenty-five thousand dollars.

Wherefore plaintiff demands judgment against the defendant for the sum of twenty-five thousand dollars and for his costs and disbursements herein.

SAMUEL A. ANDERSON,
Attorney for Plaintiff, 604 New York Life Bldg., St. Paul, Minnesota.

Endorsed: Filed Sept. 8, 1911. Matt Jensen, Clerk. By G. A. Johnson, Deputy.

STATE OF MINNESOTA,
County of Ramsey:

District Court, 2nd Judicial District.

MICHAEL A. POPPLAR, as Administrator of the Estate of Richard S. Popplar, Deceased, Plaintiff,

vs.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, Defendant.

Answering the complaint herein:

I.

The defendant admits the first paragraph of the complaint.

II.

The defendant admits that during all the times mentioned in the complaint, it maintained on its line of railway a station called Mahnomen in the State of Minnesota, and maintained and
7 operated in connection with said station, a railway yard.

III.

The defendant further admits that on the 6th day of September, 1909, and for some considerable time prior thereto, Richard S. Popplar, deceased, was employed by this defendant as a brakeman; and that on or about said 6th day of September, he sustained, at the yard operated in connection with said station of Mahnomen, as aforesaid, injuries from which he subsequently died.

IV.

Except as aforesaid, defendant denies each and every allegation in said complaint contained.

V.

For further answer, defendant alleges that the injuries which said deceased sustained as aforesaid were due to risks and hazards which he had previously, knowingly and voluntarily assumed, and were

directly caused and contributed to by the negligence of the deceased himself.

Wherefore, Defendant prays that said action may be dismissed, and for its costs and disbursements.

Dated this 29th day of August A. D., 1911.

JOHN L. ERDALL,
Soo Bldg., Minneapolis, Minn.
M. D. MUNN,
Pioneer Press Bldg., St. Paul, Minn.,
Attorneys for Defendant.

ALFRED H. BRIGHT,
of Counsel.

8 Endorsed: Filed Feb. 6, 1912. Matt Jensen, Clerk. By Jas. D. Swan, Deputy.

STATE OF MINNESOTA,
County of Ramsey:

District Court, 2nd Judicial District.

MICHAEL A. POPPLAR, as Administrator of the Estate of Richard S. Popplar, Deceased, Plaintiff,

vs.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, Defendant.

Plaintiff replying to the answer of the defendant denies each and every allegation therein contained, save and except wherein said answer admits the allegations of the complaint herein.

SAMUEL A. ANDERSON,
Attorney for Plaintiff, 604 New York Life Bldg., St. Paul, Minn.

Endorsed: Filed Sept. 8, 1911. Matt Jensen, Clerk. By G. A. Johnson, Deputy.

9 STATE OF MINNESOTA,
County of Ramsey:

District Court, Second Judicial District.

MICHAEL A. POPPLAR, Admr., etc., Plaintiff,

vs.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, Defendant.

This case came on for trial before Hon. Fred N. Dickson, J., with a jury, on the morning of Tuesday, February 6, 1912, at 11 o'clock.

Samuel A. Anderson appeared on behalf of plaintiff, and John L. Erdall and M. D. Munn on behalf of defandant.

Jury empaneled and sworn.

Case opened on behalf of plaintiff by Mr. Anderson.

Mr. ANDERSON: Mr. Munn suggests we make a statement. Of course, the complaint, I suppose, speaks for itself, excepting I notice the damage clause is put at $25,000 and it should be $5,000. I don't know as it makes any difference anyway. Mr. Storey drew the complaint. I think he had some idea that if we came under the federal liability act we would be entitled to more damages, but we are not. The only time we would come clearly under the federal liability act would be if we could show that the dead man himself, at the time he was killed, was engaged in interstate commerce, and we have no evidence in that regard. I don't state that to the jury, that is a question of law for the Court. Although it is admitted this railroad was an interstate railroad and engaged in interstate commerce, I notice they deny—I don't know whether they intended that—that the railroad yard at Mahnomen was connected with it as a part of their interstate road. I might state to the Court and to Mr. Munn that there has been a recent decision in the Supreme Court of the United States that has been decided since this complaint was drawn. If we had had that decision before it was drawn we would not have needed to have pleaded it so fully. It doesn't make any difference whether they are used in interstate or local commerce.

Mr. MUNN: The point I am getting at, you make your claim for negligence now on the ground they failed to comply with the federal statute.

The COURT: Isn't our state statute identical?

Mr. ANDERSON: The state statute is identical, but wherever the state statute and the federal statute cover the same ground the state statute, I suppose, is regarded as superseded.

LUDWIG M. HARMSEN, Sworn on behalf of plaintiff, for cross-examination, under the statute, testified:

By Mr. ANDERSON:

Q. Mr. Harmsen, you live in St. Paul?

A. Yes, sir.

Q. What is you- connection with the Soo Road?

A. City ticket agent, St. Paul; city passenger and ticket agent.

Q. How long have you been here in that capacity?

A. Five years.

Q. And as city passenger agent—is that anything different from city ticket agent?

A. Why, not in my position at the present time.

Q. Well, getting at it briefly, (I will speak of the defendant as the Soo Road) you are familiar with the Soo Road and the various places where it runs and where the tracks are?

A. That is, I know the points through which it runs, yes, sir.

11 Q. Well, you know the points to which it runs; in other words, you know where Mahnomen is, Minnesota?

A. Yes, sir.

Q. What line is that on? What line do you speak of it as?

A. Why, it is on our Winnipeg line.

Q. Runs from here to Canada?

A. That is, to Emerson; we call that the Winnipeg line.

Q. The trains that run on that line run into Winnipeg?

A. The passenger trains.

Q. And the freight trains that run on that line, how far do they go, to Emerson?

A. I am not familiar with the freight; my duties are entirely passenger.

Q. Coming through, it runs through Glenwood, Minnesota?

A. Glenwood, Minnesota, yes, sir.

Q. From there to Minneapolis?

A. Yes, sir.

Q. And from St. Paul and Minneapolis where does it run?

A. East did you say?

Q. East to Michigan?

A. And one to Chicago.

Q. And do you have any running into South Dakota and Iowa?

A. There is a branch running to South Dakota from the North Dakota line.

Q. And you have a line running from St. Paul up to Portal, North Dakota?

A. Yes, sir.

Q. Where does that line connect with the line that runs to Winnipeg? It is the same line, isn't it to Winnipeg as goes to Portal, up to a certain point?

A. As far as Glenwood, and they branch from there.

Q. And then the line from Glenwood to Winnipeg runs to Mahnomen?

A. Yes, sir.

Q. And from Glenwood it runs out through North Dakota to Portal?

A. Yes, sir.

Q. And all these lines run, you say, interchangeable, freight and passenger cars?

A. Their service on the line, yes, sir.

Q. Well, I mean all your cars are interchanged and run from various lines in various parts of the country?

12 A. Are you speaking of passenger and freight?

Q. Both.

A. Well, I wouldn't make any statement regarding freight trains, because my duties are merely in connection with passenger trains.

Q. Oh, you don't know about the freight; you know nothing about the freight department?

A. I wouldn't be in position to make any statement regarding the freight department.

A. I couldn't say—Mr. Leech was the conductor, if I am not mistaken.
Q. Leech?
A. Yes, sir.
Q. I take it then you don't know the name of the fireman or engineer?
A. No, sir.
Q. Was there any other brakeman beside you two?
A. No, sir.
15 Q. Had you come into Mahnomen and were going out or was this your starting point?
A. Our starting point.
Q. To what point were you and Popplar going with the train?
A. Glenwood, Minnesota.
Q. Was that any division point?
A. Yes, sir.
Q. How about Mahnomen?
A. That is a division point, kind of a subdivision—I don't know just what you would call it.
Q. Do you know whether they had car inspectors at Mahnomen in the yard?
A. I couldn't say.
Q. How long had you been working on that run between Mahnomen and Glenwood?
A. Three months.
Q. What proportion of that time had Popplar been working in the same crew with you?
A. He worked about half the time.
Q. How long immediately before the time of the accident had he worked with you in the same crew?
A. About a week.
Q. At the time the accident occurred, where were you relative to the location of Popplar?
A. I was right there where he was.
Q. Speaking generally, what was being done at the time?
A. He was kicking a car on Number 2.
Q. What do you mean by kicking a car, so a jury will know what you mean?
A. That is just to shove the car without stopping and pulling the pin on it.
Q. In order to make it clear, distinguish between kicking a car and shoving a car?
A. By shoving you have to stop and by kicking it you don't have to stop.
Q. In other words, in kicking then the engine and the rest of the car- go with the car to its stopping place?
A. No, sir.
Q. In shoving what is the fact?
A. Everything stops.
16 Q. But in kicking when does the uncoupling operation take place?

A. In kicking the car it is uncoupled in the motion.
Q. At the time in question was there a locomotive engine being used in the work?
A. Yes, sir.
Q. Road engine or switch engine?
A. Road engine.
Q. Was it the engine that was to take the train out?
A. Yes, sir.
Q. Which way was the engine moving, backward or forward?
A. Backward.
Q. How many cars were coupled to the engine at that time, including the cars that were to be uncoupled?
A. Three or four.
Q. Were the cars coupled by the back end of the engine?
A. Yes, sir.
Q. The engine was backing, pushing the cars back?
A. Yes, sir.
Q. How many cars were to be uncoupled and kicked in on track No. 2?
A. One.
Q. That would be the rear car or car that was the farthest from the engine?
A. Yes, sir. It's the head car by the way the train is moving.
Q. Who was performing the act of uncoupling this car in connection with the kicking operation?
A. Richard Popplar.
Q. What were you doing while he was doing that work?
A. I was standing right by him, walking along to see that it was uncoupled.
Q. You may state whether or not these two cars that were to be uncoupled were equipped with what is commonly known as automatic couplers?
A. I beg your pardon?
Q. Were these two cars equipped with what is ordinarily called automatic couplers?
A. No, sir.
17 Q. Do you know what I mean by automatic couplers?
A. I know——
Q. Were they that form of couplers known as automatic couplers?
A. Yes, sir.
Q. What was put on the ends of these two cars to be used in uncoupling and pulling pins, what do you call the appliances?
A. Lifting bars.
Q. Where was the lifting bar on the front end of the car on that train facing the engine?
A. On the right-hand side.
Q. And the lifting bar on the backward or rear end would be on the left-hand side?
A. Yes, sir.
Q. So taking the car that Popplar was uncoupling, where was the lifting bar?

A. On the left-hand side.
Q. On the left-hand side as you back up?
A. Yes, sir.
Q. Right-hand side as you face the engine?
A. Yes, sir.
Q. Was it on the side of the car that Popplar was on or the opposite side?
A. On the side Popplar was on, on the car he was uncoupling, it was on his side.
Q. How many cars were you going to kick in there?
A. One.
Q. Where was the pin lifter on the end of the car that Popplar was working on?
A. On the left-hand side.
Q. Next to him or opposite him?
A. On the car next to him it was on the opposite side from him.
Q. The car that he was going to cut off, was the pin lifter on his side or on the opposite side?
A. It was on the opposite side.
Q. Which side was Popplar on? The engineer's side or the fireman's side?
A. The fireman's side.
Q. You were going to cut off the one car?
A. Yes, sir.
Q. What do you call that car, the head or the rear car?
A. Head car.
18 Q. Was the pin lifter on what you call the head car on the side where Popplar was or was it on the side beyond, on the other side?
A. It was on the other side.
Q. Where was the pin lifter on the next car to that?
A. On the left side.
Q. Never mind the left side. Where with reference to Popplar? Where was the pin lifter on the car that was to be left attached to the engine when you cut off what you call the head car?
A. It was on the right side.
Q. Where as to Popplar?
A. It was on the opposite side from him.
Q. Now, Mr. Kornel, you say that the deceased was on the fireman's side?
A. Yes, sir.
Q. Was there a pin lifter on either one of these cars on his side?
A. Yes, sir.
Q. Where was it?
A. It was on the leading car, on the engineer's side, and on the second car it was on the fireman's side.
Q. There was one pin lifter on his side?
A. Yes, sir.
Q. Was it on his car or on the second?
A. It was on the next car, the second.

Q. Did you see Popplar, as the train was moving back, do anything towards pulling either pin? Did you see him?
A. Yes, sir.
Q. Just go on and tell in detail, what you saw Popplar do.
A. I seen him try three or four times and couldn't pull it.
Q. Try what?
A. Try the lifting bar.
Q. On what car?
A. On the second car.
Q. How did he try it, what did he do?
A. Jerked on it and he pulled up at it but it would not uncouple.
Q. Then what did he do?
A. Then he went in and pulled the pin on the leading car.
19 Q. What happened then?
A. Then he must have — because I heard him holler.
Q. Just tell what you heard and what you noticed.
Mr. MUNN: What you saw,
A. The next was I heard him holler.
Q. Tell what was said and what was done.
A. I swung the engineer down and the wheel was standing on Popplar's leg.
Q. Which wheel?
A. Forward wheel on the car that was attached to the engine or second wheel, the forward truck or second wheel.
Q. By forward truck what do you mean, the truck farthest from the engine or truck nearest the engine?
A. Farthest, then I managed to signal the engineer ahead and got him from "enunder" there.
Q. What was Popplar doing the last moment that you saw him before you heard him holler?
A. He was trying to pull the pin on the opposite car.
Q. What position was Popplar in when you saw him trying to pull the pin on the opposite car?
A. He was in between, running along.
Q. By opposite car you mean what you have spoken of as head car?
A. Yes, sir.
Q. Was the pin lifter on that head car where Popplar could reach it without going between the cars?
A. No, sir.
Q. How fast was the train moving, as near as you can tell at the time he stepped in between the cars and up to the time you heard him holler?
A. Four miles an hour.
Q. What were you doing while he was pulling or attempting to pull these pins?
A. I was walking along.
Q. When you heard him holler, where was your position with reference to the space between these two cars?
20 A. I was about 6 feet from the end of it, four or six feet.

Q. Which way, towards the engine or——

A. Towards the engine.

Q. Now, after these events, when you got him out from under the car, was Popplar then living or dead?

A. He was living.

Q. Do you know yourself how long he lived after the accident, except as you have been told?

A. I don't know except by reports.

Q. What was done with the train after he was hurt immediately afterwards and up to the time he was taken away from that place?

A. Cleared off the main line and took him to Detroit.

Q. Was he taken away from where this accident happened before or after you moved the train away?

A. Before.

Q. How long was he there before he was taken away?

A. About 20 minutes.

Q. Did he get the car uncoupled?

A. Yes, sir.

Q. What, if anything, did you do there at the place of the accident and after the accident in connection with this coupler on the car that he tried to lift a pin with the pin lifter on?

A. I tried to open them up and couldn't do it.

Q. Just tell what you did in detail; I am now speaking of the coupler on the next to the head car that he was trying to lift the pin and open the knuckle.

A. I went in there and tried to pull the pin and open up the knuckle, and couldn't open it.

Q. Tell us in detail, Kornel, as far as you can remember, what you did do. What did you do? What efforts did you make? Tell what you did in detail.

A. I tried to pull the pin up with my hands and got my fingers underneath that block and couldn't raise it up high enough to open up the knuckle.

21 Q. Did you get the pin up at all?

A. No, sir.

Q. Did you get it started?

A. I got it started and it came up about half ways and it blocked.

Q. What is there about this coupler or what was there that opened and left the cars uncouple? When the pin would be out the proper distance what was it that would open up the knuckle? What held the knuckle shut?

A. Why, it is the block.

Q. How about the pin?

A. The pin.

Q. Could you get the pin up high enough to release the knuckle?

A. No, sir.

Q. Did you try it with the pin lifter?

A. Yes, sir.

Q. Are you able to state what the trouble with this coupler was, the specific trouble?

A. No, sir.

Q. Are you able to tell us the make of the coupler?
A. No, sir.
Q. Was this a time-carded train?
A. Yes, sir.
Q. Do you know its number on the time-card?
A. No, sir.
Q. You don't remember?
A. No, sir.
Q. Did you go with the train when it went out, after this accident?
A. Yes, sir.
Q. That morning?
A. No, not with the train.
Q. Did some other crew take the train out?
A. Yes, sir.
Q. Had you any way of knowing the make-up of the train at all?
A. No, sir.
Q. You don't know what the contents were or anything of that sort?
A. No, sir.
Q. I take it then you don't know where the cars came from when they came into Mahnomen?
A. No, sir.
Q. Do you know what caused Popplar to get down and
22 under the wheel, understand I mean of your own knowledge?
Mr. MUNN: Just state what you saw.
Q. You understand I want to know whether you saw him fall or whether you know of your own knowledge what made him fall.
A. It is pretty hard to say.
Q. You know whether you know of your own knowledge.
A. I know I seen him fall over a bunch of switches and one thing another.
Q. What I want to get at, you don't know just what it was that caused him to fall?
A. No, sir.
Q. What was there at the place, that is, on the track, of your own knowledge. at the place where he was picked up?
A. There was a guard rail and couple of frogs and one thing and another.
Q. You mean there were switches and frogs around that vicinity?
A. Switches and frogs.

Recess until 12 o'clock noon.

Cross-examination.

By Mr. MUNN:

Q. As you faced the engine on your train in the movement in which the train would go if moving forward, the lifting lever on

each car would be on the right hand side, or engineer's side on the front end of the car?

A. Yes, sir.

Q. And there is the same kind of a lifting lever on the opposite side of the rear end of the car?

A. Yes, sir.

Q. That is there is a lifting lever on each end of each car?

A. Yes, sir.

Q. This train was backing up?

A. Yes, sir.

Q. And therefore the plaintiff, deceased, was attempting to lift the pin upon the second car from the hind end?

A. Yes, sir.

23 Q. On the fireman's side?

A. Yes, sir.

Q. There was a lifting bar on the opposite side of the front end of the rear car?

A. Yes, sir.

Q. That is the car that you were kicking in?

A. Yes, sir.

Q. I understand you to say that after the accident was over the car which you were kicking in had been uncoupled from the rear of the train?

A. Yes, sir.

Q. So that Popplar had succeeded in uncoupling as he stepped in there?

A. Yes, sir.

Q. What portion of the train passed over him?

A. I would call it the forward truck, one wheel and the second——

Q. Take it this way: The car next to the one you were kicking in had two pairs of trucks on it, four wheels on each truck?

A. Yes, sir.

Q. How many wheels passed over Popplar as you found him?

A. One. One wheel and the other stopped on his leg.

Q. The second wheel of the same truck?

A. Yes, sir.

Q. As you found him one pair of wheels had passed over him?

A. Yes, sir.

Q. One pair had?

A. The second wheel stood on his leg, the forward truck.

Q. When you heard him holler you signalled the train to stop?

A. Yes, sir.

Q. How far did it move after you signalled it?

A. Two or three feet.

Q. The train was moving when he went in between them about four miles an hour?

A. Yes, sir.

Q. Now, you made a report to someone on behalf of the Soo Road the day or day following the accident?

A. Yes, sir.

Q. I ask you to look that over and see if that is your signature. (Def't's Exhibit 1 handed witness). Is that your signature at the bottom?

A. Yes, sir.

Q. You stated to this party the facts regarding the accident, as you remember them and understood them?

A. Yes, sir, as near as I can recall, that is if he put them down as I told him.

Q. When you found Popplar's body he was not caught anywhere; his feet were not caught in anything?

A. No, sir.

Q. You say the destination of this train was Glenwood, Minnesota?

A. Yes, sir.

Q. Going from Mahnomen, the place where you were making up, in Minnesota, to Glenwood, Minnesota?

A. Yes, sir.

Redirect-examination.

By Mr. ANDERSON:

Q. You may state whether or not Popplar, at the time of taking a hold of the pin lifter, in connection with his attempting to pull the pin, gave any stop signal, whether you saw him.

Mr. MUNN: Objected to as incompetent, immaterial and inadmissible under the pleadings.

A. Yes, sir.

Recross-examination.

By Mr. MUNN:

Q. You were throwing this switch for the purpose of having this car thrown in on the siding track?

A. We had already thrown it. We came in off No. 3 or 4, and we were letting that car in on No. 2.

Q. And you were at the switch attending to that?

A. I threw the switch and he gave them the signal.

Q. You were the man giving the signal to the engineer or the fireman handling the train?

A. I was the man.

Q. You were the switchman in charge of giving the signals for the movement of that train?

A. I was there to help, yes, sir.

Q. It was your duty to give signals?

A. Yes, sir.

Mr. ANDERSON: Who was the man to give the signals in connection with the kicking and the uncoupling?

WITNESS: Popplar gave the first signal and what it was he gave I repeated it.

Mr. MUNN: It was your duty to repeat it?

WITNESS: Yes, sir.

MICHAEL POPPLER, sworn in his own behalf, testified:

By Mr. ANDERSON:

Q. Where is your home, Mr. Poppler?
A. Frazee, Minnesota, at present.
Q. You are the father of the deceased Richard S. Poppler?
A. I am.
Q. At the time of your son's death where were you living?
A. In Fargo, North Dakota.
Q. You are married?
A. I am.
Q. Your wife is living?
A. She is.
Q. What is her name?
A. Lillian F. Poppler.
Q. How old are you?
A. Fifty-three years; I will be fifty-three in March.
Q. And how old is your wife?
A. Fifty years.
Q. And was she the mother of Richard Poppler?
A. She is.
Q. How old was Richard, your son, at the time of his death?
A. He was twenty years and about ten months old.
26 Q. Would be twenty-one which month, October or November?
A. I think it was the 19th of October he would have been twenty-one.
Q. He would have been twenty-one the 19th of October of that same year?
A. 1909.
Q. Did you see him on the day of the accident and before he died?
A. I did not.
Q. When did you see him?
A. I didn't see him until the day of his burial.
Q. Was that the next day or the second day following?
A. The funeral was on the 8th.
Q. When did Richard start railroading?
A. Some time in April, 1907.
Q. And for what company?
A. The Soo Railroad Company; Minneapolis, St. Paul and Sault Ste. Marie.
Q. In what capacity, do you know,—brakeman?
A. Brakeman.
Q. Did he continue with the Soo, then, until the time of his death?
A. He was with them all the time up to his death.
Q. And during those two years and three or four months was he home from time to time?
A. He was home twice; I think two separate times.
Q. Do you know what his runs were generally, in this same vicinity that he worked all these two years or such a matter?

A. No, part of the time he was on what they called the feed line, running from Kenmare to Overly and Adams.

Q. Well, it was up in the northwestern part of the country?

A. Yes, all over the northwestern part of the country all the time.

Q. And did you live in Fargo all the time he was working for the Soo?

A. Yes.

Q. You and your wife?

A. We did.

Q. And before he started to work for the Soo what did
27 Richard do?

A. He was going to school up to the time just a year before he went working for the Soo; he graduated from the high school.

Q. Oh, then——

A. He hadn't worked at anything until he went to work for the Soo.

Q. Then he started to work for the Soo, that was his first work after he left school?

A. Yes, sir.

Q. And then his wage-earning time was during these two years and some months, he hadn't earned wages before?

A. No.

Q. And prior to the time he went railroading were you in business in any way where he helped you at all?

A. I was.

Q. And Richard helped you in your work?

A. Yes.

Q. What business were you in up to the time he went railroading?

A. General mercantile business.

Q. Now, since he has been railroading from April, 1907, until the time of his death you may state whether or not he contributed from his wages by sending you or your wife, or both of you, money?

A. He did.

Q. Can you give us approximately the total amount of money he sent home to you and your wife between the time he started in April, 1907, until the time of his death?

A. He sent an average of about $25 a month, or about $300 a year.

Q. So the total would be about how much?

A. The total would be between five and six hundred dollars.

Q. Was he a boy or man in good health, was he a strong and healthy man?

A. Yes, sir.

Q. How about his habits,—good?

A. His habits were always good.

Q. Did he live at home up to the time he went railroading, with you and your wife?

A. Yes, sir, he was home.

28 Cross-examination.

By Mr. MUNN:

Q. Mr. Poppler, you say that you were in the general mercantile business at Fargo, North Dakota?
A. No, at Vergas, Minnesota.
Q. Where is that located?
A. On the Soo line, between Glenwood and Mahnomen.
Q. That is, on the same line that your son was running over in going from Mahnomen to Glenwood?
A. Yes, sir.
Q. And that had been your home for how many years?
A. About two years.
Q. And you say your son began railroading in April, 1907?
A. Yes.
Q. And he received the injuries from which he died in September, 1909?
A. Yes.
Q. And you say he was home only twice during that time?
A. Yes.
Q. Did you have any arrangement or agreement with him when he left home at the age of eighteen about sending you money?
A. Have any arrangement with him about sending money?
Q. Yes.
A. Yes, he told us that he would send us so much every month.
Q. That is, you let him go on the agreement he was to return you so much a month while he was a minor?
A. I don't understand.
Q. You knew you were entitled to his services while he was a minor, while he was under age?
A. Knew he was a minor?
Q. Yes.
A. Yes.
Q. And you would let him go with the Soo road if he sent you so much money while he was a minor?
A. Yes, sir.
Q. And it was under this agreement he was to send you
29 this money?
A. No, there was no agreement as to his going or as to his doing this, but he said he would do that, he would contribute that much. Now, at the time he was working for the Soo, we didn't live at Vergas.
Q. Where did you live?
A. At Fargo, North Dakota.
Q. That is what I understood.
A. Moved to Vergas, Minnesota, in about the 1st of October, 1904, and lived there until the 1st of October, 1906.
Q. Yes, then you went to Fargo?
A. Then I went to Frazee, and from there to Fargo, in 1907.
Q. Yes, and you have been living in Fargo ever since?
A. Yes, up to the 1st of January.

Q. What has been your business at Fargo?
A. I was traveling, on the road.
Q. For whom?
A. I was with the Sun Piano Company for two years, and with the Reese Thresher Company and Lincoln & Shepard Thresher Company up to the 1st——
Q. Who made the arrangement with the Soo road for you- son's employment, did you or he?
A. I don't know.
Q. But he told you if you would let him go to work for the Soo, he would send you some money every month?
A. He didn't tell us when he went to work to do that.
Q. What?
A. He didn't make any arrangements about what he was going to send us.
Q. When did he make the arrangement?
A. He told us if he could he would send us that much a month.
Q. Weren't you earning enough to support yourself and wife?
A. Why, yes.
30 Q. How did you come to ask your son to send you some money?
A. I have got a large family.
Q. And you wanted him to help support the family before he came of age?
A. He wished to do it.
Q. He wished to do it?
A. Yes.
Q. Do you know whether he was engaged to be married?
A. I don't know.
Q. And you say he only came home twice during the entire time he was working for the Soo road?
A. I think he was home only twice.

By Mr. ANDERSON:

Q. Was there any arrangement for him not to pay anything after he became twenty-one?
A. No arrangements at all; there were no arrangements; simply he said he would do this and he did; he wanted to do it.

Recess until 2 P. M.

By Mr. MUNN:

Q. Mr. Poppler, I show you Def't's Ex. 1, which is your son's application for a position, and ask you if you recognize that as his signature on there.
A. Yes, sir.
Q. I show you Def't's Ex. 2, which is the receipt given by him of this circular; is that his signature?
A. It is similar to it.
Q. You think it is, don't you? It is his receipt of a circular.
A. I should think that it was.

Q. You think it is his signature?
A. Yes.

Mr. MUNN: It is admitted that Mahnomen is a station on one of the lines of the Soo road over which some interstate business is done; that the line from Mahnomen is a line extending from Glenwood to Emerson, all of which is in the state of Minnesota, but the line passing through Glenwood with which this connects is the
31 main line of the Soo road running from Minneapolis to points in North Dakota, and that there is some interstate business done on the line which passes through Mahnomen. And it is also admitted that the plaintiff has been appointed administrator.

Mr. ANDERSON: Certified copy or authenticated copy of the letters of administration filed in the office of the probate court, pursuant to the statute.

Plaintiff rests.

Mr. MUNN: If the Court please, we now move that the court dismiss this action upon the following grounds.

First. That the plaintiff has failed to establish any cause of action under the pleadings;

Second. That the testimony fails to establish any negligence on the part of the defendant which was either the proximate cause of or responsible for the injuries complained of which resulted in the death of plaintiff's deceased; and

Third. Upon the ground that the testimony shows such negligence on the part of plaintiff's deceased contributing to or causing the injuries complained of which resulted in the death of plaintiff's deceased as to preclude a recovery.

The motion was argued at some length in the absence of the jury.

The COURT: I think I shall deny the motion. I believe it is a question to go to the jury as to whether or not under all the circumstances he exercised the care commensurate with the circumstances for his own safety, and let the jury consider the facts that he could have gone over the car or stopped them or gone around the car to use this lever on the other side, and it is for them to say whether his failure to do that was his failure to exercise due care.

32 Exception by defendant.

Case opened on behalf of defendant by Mr. Munn.

DUNCAN LEACH, sworn on behalf of defendant, testified:

By Mr. MUNN:

Q. Mr. Leach, you were two years ago last September a freight conductor on the Soo road?
A. Yes, sir.
Q. Running between Mahnomen and Glenwood, Minnesota?
A. Yes, sir.
Q. Do you remember the morning of the accident to Mr. Poppler?
A. I do.

Q. Mr. Poppler was a brakeman on your train, was he?
A. Yes, sir.
Q. This accident happened about what time in the morning?
A. Well, it was about 6 o'clock, I think.
Q. Well, you were making up your train in the morning to go out?
A. Yes, sir.
Q. It was daylight?
A. Yes, sir, daylight.
Q. How many cars were on that engine, if you know, at the time of the accident?
A. It was either two or three.
Q. It was either two or three, you aren't sure whether it was two or three?
A. No, I wasn't right there at the time of the accident.
Q. Had you given directions to have one car left in on track No. 3?
A. Yes, sir.
Q. Siding?
A. Yes, sir.
Q. And the crew were putting that car in at the time the accident happened?
A. Yes, sir.
Q. Where were you at that time?
A. I was in the depot.
Q. You were up at the station?
A. Yes, sir.
33 Q. Getting your clearance papers and orders?
A. Way-bills.
Q. Was this an empty car that they put in on that siding?
A. Well, I don't just remember now.
Q. Well, you didn't see the accident?
A. No, I didn't.
Q. How soon afterwards did you come there?
A. Just about two or three minutes; just about as quick as I could.
Q. And where was Mr. Poppler when you got there?
A. Just crawled out from under the car.
Q. How?
A. He just got out from under the car at the time I got there.
Q. What did you do?
A. Why, we took him into the depot and called the doctor there; then we made up our mind to take him to Detroit.
Q. Detroit, Minnesota?
A. Yes, sir; we thought that was the best place for him, to go to the hospital there.
Q. You took him down in the engine?
A. Well, as soon as we could set our train out we took our caboose and engine and took him to Detroit.
Q. What did you do with those two cars which were put on track No. 3 and taken off the engine?

A. I think we left them right there.
Q. Took them right off the engine and left them there?
A. Yes, sir.
Q. They were being backed in, were they?
A. Yes, sir.
Q. The deposition of Mr. Kornell which was read here says they were kicking one of these cars in.
A. Yes, sir.
Q. Describe the process of kicking in, what it means.
A. Why, kicking, just a string of cars—it means giving
34 the sign to back up until they get a stop sign.
Q. That is, you give him a sign to back up, and then stop him and one car or more are let loose and run down with the motion they are under?
A. Yes, sir.
Q. That is what you call kicking?
A. Yes, sir.
Q. Are you familiar with the coupling devices on the cars that were being used on the Soo road at the time this accident happened?
A. Why, yes, I am familiar with all of them.
Q. Will you describe how these knuckles lock together? Just generally. Supposing the cars are uncoupled, the two knuckles stand open, don't them?
A. Yes, sir.
Q. Now, when those knuckles come together they lock the same as my hands are now?
A. Yes, sir, lock themselves.
Q. And this pin drops right into those knuckles as they are together?
A. Yes, sir, the knuckle is back, the pin drops in and holds them there.
Q. Now, I don't know whether you can get this on the record or not, but when I use my hands this way, the fingers bend in on each other's ends that way, that illustrates about how the knuckles work?
A. Yes.
The COURT: Let me ask a question: Where does the pin go?
Q. Describe where the pin drops in; does it drop right in between my fingers there?
A. No, the two knuckles this way, each one would have a pin; the same as this is, the head of the drawbar, the pin drops in behind each knuckle and closes.
Q. Well on each end of the car, you mean?
A. Yes, on each end of the car.
Q. Well, there is only one pin on each end of the car?
A. Yes.
35 Q. Now, that drops into these knuckles?
A. Drops in behind when they are closed.
Q. It doesn't drop in between the knuckles, it drops in back of one of them?
A. Drops in behind.
Q. That keeps the knuckle from swinging open then?

A. Yes, sir. Not behind them, it drops in when they are shut, it drops right in so they can't open again until that pin is lifted.

Q. Now, as you are pushing the train, what effect does that have on the pin?

A. Well, it generally makes a slack so you can pull it.

Q. Suppose you are drawing——

A. You can't pull the pin at all then.

Q. Why?

A. Well, they bind when they stretch out.

Q. And supposing you were pushing the train what effect does it have?

A. Slack.

Q. If the slack is all in then they would be loose?

A. Yes, sir.

Q. Now, supposing you were backing in and had quite a momentum and if you began slowing down your engine the cars that would be beyond the engine will move faster?

A. Yes, sir.

Q. And stretch out?

A. Yes, sir.

Q. What effect does it have on the pin?

A. You couldn't pull the pin.

Q. So that if this engine in backing these two or three cars in on the sidetrack had got up the momentum necessary to set the car in, and had begun to slow down the engine, that would in itself let the slack out so as to bind, would it?

A. It would if they were stretched out.

Q. That is, the cars would keep up their speed of five miles an hour and the engine four, and thus run faster than the engine would go?

A. Yes, sir.

36 Q. And that would take the slack out and bind the pin?

A. Yes, sir.

Q. And then you would either have to suddenly increase the speed of the engine or else stop the car to get that slack back in?

A. Yes, sir, you would have to increase the speed or stop.

Q. And that would be done by the brakeman giving the signal?

A. Yes, sir, the brakeman would give the signal.

Q. In going along side of the train and he saw the slack was out and the pin wedged on account of it, it would be his duty to do what?

A. Well, it would be his duty to stop or try the other side.

Q. Or to give some signal to the engineer to aid him?

A. Yes, sir.

Q. I suppose if the engineer increased the speed so as to catch up with the cars, that would loosen the pin, wouldn't it?

A. Yes, sir.

Q. But you say he could stop it entirely and then start?

A. Wouldn't loosen it; either.

Q. What were you doing this morning with your train?

A. Well, we were just making up in the yard.

Q. Were you on time?
A. Why, I think we were just about on time.
Q. You had given no orders to anybody to hurry, had you?
A. No; no special hurry.
Q. You were leaving the brakeman to do the switching there while you went up to the station?
A. Well, we had made all up but these few cars.
Q. Your entire train was made up except this one car?
A. That was all there was left to do.
Q. And you left that to Mr. Poppler and the other brakeman to do?
A. Yes, sir.
37 Q. Who was in charge in doing that, giving signals there, —Mr. Poppler?
A. Mr. Poppler.
Q. He was the man in charge of that engine and two cars then?
A. Yes, sir.
Q. At the time of the accident?
A. Yes, sir.
Q. Did you yourself try those pins after the accident?
A. Why, I tried about four hours afterwards.
Q. That is, after you had been down to Detroit?
A. Yes, sir.
Q. You went down to Detroit with Mr. Poppler?
A. Yes, sir.
Q. Well, when you came back how were the cars standing?
A. Well, they were shoved in there on the track, not coupled together.
Q. They were where the accident occurred?
A. Right near there.
Q. On that sidetrack?
A. Yes, sir.
Q. They hadn't been touched? I mean they hadn't been moved?

Mr. ANDERSON: He does not say that at all.

Q. Had they been moved from the point of the accident?
A. Well, I couldn't say whether they had been moved at all.
Q. Were they the same cars that were being switched in there when you intended to leave one of them on the side track?
A. Yes, sir, they were the same cars.
Q. And how near the point of where the accident occurred were they standing when you came back?
A. Why, just a few carlengths, I should think.
Q. What?
A. Just a few carlengths; they might have been in the same place.
Q. You didn't notice?
A. Just shoved in the clear, was all, of the other tracks.
38 Q. They were still on that sidetrack?
A. Yes, sir.

Q. Had there been any train in there during that time?
A. Well, there had been another crew working around there after I left there.
Q. Another freight crew?
A. Yes, sir.
Q. But they hadn't picked up these two cars?
A. No, they hadn't.
Q. What condition did you find those pins in when you examined them after coming back?
A. Why, I could open any of them.
Q. Did you try them?
A. Yes, sir, I tried them.
Q. Lifted all right?
A. Why, they worked a little hard, but they lifted so I could lift them all right.
Q. Were the cars coupled together or uncoupled when you were there?
A. The last time?
Q. Yes.
A. They were uncoupled.
Q. Which pin was it that worked hard of those you speak of?
A. Why, it was the west end of one of those cars, the one he was trying to pull.
Q. The one he was trying to pull; that is, the first one, you mean?
A. Yes, sir.
Q. But you could work it all right?
A. I could work it, yes, sir.

Cross-examination.

By Mr. ANDERSON:

Q. Whom are you working for now?
A. Working for the Soo Railway.
Q. Conductor still?
A. Yes, sir.
Q. Where is your run?
A. Working between Minneapolis and Glenwood.
Q. And you have been a conductor for years for the Soo—several years?
A. Several years, yes, sir.
39 Q. Now, at the time this accident occurred you were at the depot or station?
A. Yes, sir.
Q. How far was that from the scene of the accident?
A. Well, just five or ten carlengths, was all.
Q. And the first you knew of an accident was when you had some report upon that proposition?
A. What is the question?
Q. The first you knew there was an accident, some one told you?
A. Why, just as soon as I got to the depot; I just left them there; a few minutes, about.

Q. Somebody told you there had been an accident?
A. Nobody told me; I seen somebody running.
Q. Then you went back?
A. Something was wrong.
Q. What track was the engine standing on when the accident occurred or running on?
A. Why, they was either on 2 or 3 or else right on the lead.
Q. Well, when you make a kick you don't customarily run in on the track you are going to run the car on in order to make the kick?
A. Depends on the condition of the ground there; if it is uphill——
Q. How was the ground there?
A. Just about level.
Q. And this train was on the lead at the time the kicking process was going on, wasn't it?
A. Somewheres there, yes, sir.
Q. Well, "on the lead" means it was on the track from which these sidetracks branched off?
A. Yes, sir.
Q. You had a lead track there didn't you?
A. Yes, sir.
40 Q. And tracks 2, 3 and 4 led off of the lead?
A. Yes, sir.
Q. I notice you said you were setting this car in on track 3; do you know it was track 3 or wasn't it track 2?
A. No, we were making up out train on 2.
Q. They are side by side, are they, 2 and 3?
A. 2 and 3.
Q. What were you going to do with the car that was attached to the engine, assuming there were two cars on the train at that time?
A. Well, I don't just remember; I didn't keep no copy of the list.
Q. You didn't know whether it was going to be a part of your train at that time or not?
A. No, sir.
Q. Don't know one way or the other. Don't know whether it was loaded or empty?
A. No, sir.
Q. And you don't know whether the car that was being kicked was loaded or empty?
A. No, sir.
Q. You say when you got back there Poppler was just coming out from under the car?
A. Yes, sir.
Q. He sets that, you say?
A. That sets the brakes he move himself or did I misunderstand you?
A. Well, I will say when I got there he was just out from under there.
Q. Who was with him?

A. I don't remember who it was.
Q. Mr. Kornell was there?
A. Kornell was there and the other brakeman and several other people there by that time, I guess.
41 Q. They had got there ahead of you, and then you picked him up or assisted, and took care of him at once?
A. Yes, sir.
Q. And you stayed with him until he got to Detroit, I take it; is that right?
A. Yes, sir, we took him to Detroit.
Q. Now, what do you know about what was done with the two cars? I am assuming now you said there were either two or three cars in the train.
Mr. MUNN: Two cars.
Q. Two cars, Mr. Munn says, so we will speak of this train that was then being switched as two cars and the engine.
A. Yes, sir.
Q. Now, do you know what was done with those two cars from the time that you saw this man lying there and up to the time that you got back from Detroit?
A. No, I couldn't say, because I wasn't there.
Q. You don't know what was done with the cars at all, do you?
A. No, couldn't say, because I wasn't there.
Q. And you don't know what was done with the couplers?
A. They were left right there with the cars.
Q. You don't know what was done with respect to the couplers, do you, while you were gone, during the four hours?
A. No, sir.
Q. Now, when you got back at the end of four hours or thereabouts you found these two cars uncoupled,—were they?
A. Yes, sir.
Q. How do you know they were the same cars? I am not questioning you, but I want to see how you know it.
A. Why, I just remember they were the same cars we had hold of.
Q. Did you make a note of it or take the numbers?
42 A. Well, they were foreign cars; that is one reason I remember.
Q. Flat cars?
A. I think one was a flat and the other a boxcar.
Q. Is that a fact? Do you know for certain? Is that a motive for your saying when you are certain or not?
A. Well, I am pretty sure that was the same.
Q. Well, which was the flat car?
A. That was the one farthest away from the engine.
Q. Which way were the cars being backed at the time of the accident?
A. Backed west.
Q. Well, then was it the west car or the east car that was the flat car?
A. It was the west car that was the flat car.

Q. That was the car they were kicking?
A. Yes, sir.
Q. Well, now, are you quite positive that was a flat car?
A. Well, I wouldn't be too positive of anything that happened that long ago.
Q. Yes, I know, but you say they were both foreign cars?
A. Yes, sir.
Q. Do you know whose cars they were?
A. Why, I remember the initials of them.
Q. What were the initials?
A. M. C. and N. P.
Q. What is M. C.
A. Michigan Central.
Q. And Northern Pacific?
A. Yes, sir.
Q. But the other car, you are quite sure was a box car?
A. Well, I aint sure there was three cars.
Q. No, two cars. You said the west car was a flat car; now, the car west of that (we are speaking of two cars) was that a box car?
A. What was the question?
Q. You say one car was a flat car?
A. Yes, sir.
Q. That is the west car?
A. Yes, sir.
43 Q. That is, you think it was?
A. Yes sir.
Q. And the east car, or the one coupled to it, was a box car?
A. I think it was.
Q. You aren't quite sure of that?
A. No, sir.
Q. Well, didn't you at the time this accident occurred, as conductor, have to make a written report of the accident?
A. Why, yes, I did.
Q. You made out a report that day, didn't you?
A. Yes, sir.
Q. And you had to put the number of the cars in, didn't you?
A. Yes, sir.
Q. And the description, as to whose cars they were?
A. Yes, sir.
Q. Have you seen that report since you made it?
A. No, I haven't.
Q. You turned it in to the company or superintendent?
A. Yes, sir.
Q. And when you say now that you can't remember you mean it has been over two years and you aren't quite sure now as to what you did put into your report as to cars except you know they were foreign cars?
A. I remember they were foreign cars.
Q. Now, Mr. Munn asked you if you were familiar with the kind of couplers used on the Soo road; you remember his question?

A. Yes, sir.
Q. And you stated you were. What kind of couplers are used on the Soo road?
A. Well, they use all kinds.
Q. That is what I thought. Well now, what do they use generally on their own cars?
A. More Washburn.
Q. Are you familiar with the Tower coupler?
A. Yes, sir.
Q. Well now, what kind of coupler was this one you tried after four hours, and you said worked hard but you could work
44 it; what make was it?
A. I couldn't say.
Q. Didn't you put it in your report?
A. I don't know.
Q. Didn't you know whether it was a Tower coupler or not?
A. I couldn't say now.

Mr. ANDERSON: Have you got the report, Mr. Munn?
Mr. MUNN: I haven't it here.

Q. Now, when you are making a kick, the object is purely and simply to get up momentum enough so that when you pull the pin the car that is uncoupled, or the cars that are uncoupled, will go to the point desired?
A. Yes, sir.
Q. By their own momentum?
A. Yes, sir.
Q. And the speed and the distance you run depends entirely upon how far you want to kick and the condition of the track and things of that sort, I take it?
A. Yes, sir.
Q. A kick is an operation that is of daily occurrence, of course, in your railroad experience, isn't it?
A. Yes, sir.
Q. In fact, you do it almost every time when you have any switching to be done in the making up of your train, don't you?
A. Yes, sir.
Q. And when you stop at way stations you almost always, if you have much switching to be done, you have to do kicking, don't you?
A. Yes, sir.
Q. And it is an operation, when it comes to the point of pulling the pin and giving the stop signal, is a quick operation, isn't it?
A. Yes, sir.
Q. Generally in making a kick the man who is pulling the pin also gives the stop signal, doesn't he?
A. Yes, sir.
Q. And generally when you are using these automatic
45 couplers—and of course you don't have any other kind of cars any more, do you?
A. No, sir.

Q. And generally you give the stop signal at about the same time you take hold of the pin lifter to pull the pin, don't you?

A. Yes, sir.

Q. Because in your experience you have to assume that as soon as you take hold of the pin-lifter and raise it the pin will come and by that time the engineer will have applied his brakes; that is right, isn't it?

A. Yes, sir.

Q. You don't wait until you pull the pin and then give a signal, do you?

A. Not generally.

Q. You would only do that on special occasions where there may be something wrong or something of that sort, isn't that right?

A. Yes, sir.

Q. So that if Poppler, assuming, as Mr. Munn spoke of it, if Mr. Poppler, after trying the pin and it wouldn't work, stepped in between the cars to reach over and get the other pin and pull it with his hand, he would ordinarily give the stop signal just before he stepped in?

A. They should come to a stop before he steps in there.

Q. You don't mean to testify, do you, Mr. Leach, that you always stop the train when your pin-lifter wouldn't work?

A. I have, lately, yes, sir.

Q. Since this accident?

A. Before the accident.

Q. How long have you been doing that when you say lately?

A. The last three or four years.

Q. Did you have some accident that made you do it?

A. Yes, sir.

Q. Yes; but ordinarily in railroad work, in your experience and from your observation, when making a kick, when the pin-lifter won't lift the pin, you step off and pull the other pin, don't you?

Objected to as not cross-examination.

46 Mr. ANDERSON: I submit it is, because he asked this witness about the duty, and had this witness testify it was his duty to go around the train.

The COURT: He may answer.

Mr. MUNN: No, I beg your pardon, I didn't ask him that at all.

Mr. ANDERSON: He testified to that.

A. A careful man would stop.

Q. A careful man; I am asking you ordinarily what is done there in railroading and what you have done during your many years of experience.

Objected to as not cross-examination, not shown to have been known to the deceased.

The COURT: He may answer.

A. Well, I haven't been doing it myself.

Q. I suppose you have made a kick many times, of ten, fifteen or even twenty cars off from a train, haven't you?

A. Yes, sir.
Q. You have had it so the pin lifters wouldn't work, haven't you?
A. Yes, sir.
Q. Under those conditions do you stop your train then and go clear around on the other side and pull the pin?
A. That wouldn't be necessary; you could stop it right there and stand still, not necessarily go around.
Q. I asked you not what was necessary but do you go around the train under those conditions?

Objected to as not cross-examination and assuming facts that are not referred to in direct examination.
Question withdrawn.

Q. When you are making a kick, the purpose and intent is to uncouple and do it quick so the train or cars will run away, isn't it?
A. Yes, sir.
Q. And generally when you are doing switching operations you are working rapidly, aren't you?
A. Why, generally, yes, sir.
47 Q. And particularly when you are making up a train, I mean.
A. Yes, sir.
Q. Now, you have been asked some questions about the difficulties of pulling pins, when they can and when they can't pull; now, if you have a train of two cars, as we had here, and your engine is running ahead pulling the two cars, can you pull the pin between those two cars while the engine is running ahead on a level track?
A. Well, not very often; you might; the slack might suddenly run out so you could.
Q. But when a train is running along, then of course you couldn't?
A. No, unless there is slack.
Q. There isn't any slack unless you stop again on a level track, when you are moving?
A. Sometimes the track is uneven or something.
Q. Well, I mean ordinarily when you are pulling ahead, the slack is stretched out?
A. Generally.
Q. But where you are backing up the slack is always pushed in as long as you would keep backing?
A. Yes, sir.
Q. And when you have a heavy train the slack is not only loosened, but the big springs are pushed in also, aren't they, compressed?
A. Yes, sir.
Q. And the most favorable condition to pull a coupler or pin is when you are backing up, isn't it?
A. Yes, sir.
Q. It doesn't make any difference whether you have a train of

fifty cars and you are pushing the whole fifty cars, you can uncouple any part of that train when the couplers work right?

A. Yes, sir.

Q. And you understand these automatic pin-lifters and couplers are supposed to work instantly when you take hold of the pin when the slack is in?

A. Yes, sir.

Q. Now, this coupling-pin on the west end of this car you
48 tried didn't work right after four hours absence?

A. It worked stiff, that is all.

Q. Well, it worked very stiff, didn't it?

A. Not very.

Q. Well, how hard did you pull on it before you worked it?

A. Well, I couldn't say just how hard.

Q. Did you use all the muscle you have in your right arm?

A. No, I didn't.

Q. Well, you used a large proportion of it?

A. Well, I don't know as I did.

Q. It is much easier to pull a pin when you are standing than if you are pulling the train, on a train running?

A. Yes, sir.

Q. It is easier when you are standing still and no car coupled to it?

A. Yes, sir.

Q. And even then it worked hard?

A. Well, it worked a little bit hard.

Q. I noticed on your direct examination you hesitated quite a while before you said it pulled a little bit hard; why did you hesitate? What did you have in your mind?

A. I didn't want to make out it couldn't be worked; it could be worked.

Q. If you had found that coupler working as hard as you found it four hours afterwards, wouldn't you report it?

A. It wouldn't be my place to report it in a place like that.

Q. Well, whenever you got to the place to report it you would have reported it as a bad coupler?

A. Yes, sir.

Q. You know as well as anybody that a coupler that works hard when it is standing still is out of order, isn't it, as that term is used in your railroad work? It is out of order?

A. Well, it couldn't be called bad order.

Q. Well, if you had got into Glenwood and set it out
49 there with that car and it had worked as hard as that, you would report that to the inspectors as a bad order coupler, wouldn't you?

A. I would tell them it worked hard.

Q. You would report it as a bad order?

A. No, sir.

Q. What do you call a bad order?

A. One that is broke or can't be worked at all.

Q. Don't you report couplers until they can't work at all?

A. If you can work them without too much trouble it is all right.

Q. Would that coupler as it worked four hours afterwards, in your honest opinion, be a proper coupler in a train on the road?

A. (After pause.) Why, yes.

Q. It would be all right to have all your couplers that way, would it?

A. As long as it could be worked.

Q. Well, could it be worked in your ordinary operations in the way you found it? I am not talking about when it is standing there and you are there with your big powerful frame raising it, I am asking you when you are operating couplers like that in your ordinary rough and tumble work was it in a proper condition?

A. I couldn't see what was the matter.

Q. I didn't ask you what was its specific condition; did it work properly?

A. It worked stiff.

Q. I want you to answer this: Working as stiff as you found it and you came to a division point you would report that or call the inspector's attention to it and have him fix it, wouldn't you?

A. Yes, sir.

Q. That is what I want. Now, in working couplers to work the lever properly they work that way? (Indicating on model.)

A. Yes, sir.

Q. Substantially, I mean, with the power you have on the lever outside you pull them substantially as readily as that one I have there in my hand?

A. Easy.

50 Q. Now, when you speak about the pin dropping in behind the coupler, doesn't it depend upon the make of the coupler as to where the pin goes?

A. Yes, sir, it is a difference in them.

Q. Do you know where that coupler goes?

A. It has got a dog in there, a block, that holds it.

Q. What do you call this little pin here that is back of the regular pin; it is the lock pin?

A. Lock pin.

Q. And it is that and the appliance underneath that locks that shut?

A. Yes, sir, that little thing inside there.

Q. And every once in a while in operating, in a Washburn coupler or the Tower coupler, or the Ajax or any of those, it frequently happens that something gets wrong down in the mechanism here and you can't get them open?

A. Yes, sir.

Q. And you work with them and jar them and pound them, and you will find they come open?

A. Yes, sir.

Q. And then they will work along all right?

A. Yes, sir.

Q. Other times you will find this pin bent?

A. Yes, sir.

Q. And sometimes you find the links crossed—I don't mean crossed, but get down in the hole here; that frequently occurs, doesn't it?

A. Yes, sir.

Q. Now then, if this coupler just after this accident was one that had a block in connection with the appliances, in the body of it, draw-head, does that tell you what make that coupler was?

A. No, there is too many of them too much alike.

Q. The Tower isn't the only one that has those now?

A. No.

Q. By the block—I don't suppose you can see it here—but
51 showing the Tower coupler, that is what is called the block or lock?

A. Either one.

Q. Now, is the Tower coupler the only one that has the lock or block, or are there others?

A. It seems to me there is others.

Q. Now then, if that coupler on that west end of that east car, that is, the car the engine was coupled to immediately after this accident, was in this position, the knuckle was closed, and Kornell, as brakeman, took hold of that pin-lifter, the cars are uncoupled, you understand——

A. Yes, sir.

Q. ——and standing still then, and he pulled and worked with that pin-lifter and couldn't open the knuckle, then it was bad order?

A. If it couldn't be opened.

Q. But if he stepped in to the knuckle and put his hand in and worked with the block and shook the knuckle and tried to open it and failed, it is a bad-order coupler, isn't it?

A. If it couldn't be worked.

Q. You have heard what I said?

A. Yes, sir.

Q. And you would report it at once as in bad order, wouldn't you?

A. Yes.

Q. And if you were hauling a train on the railroad tracks and you found anywhere at a station a coupler of that sort, you would set that car out and report you couldn't get that knuckle open, wouldn't you?

A. Yes, sir.

Q. You are required to set them out, aren't you?

A. Yes, sir.

Q. Now, you take this very train of two cars, and you say the tracks there were level, weren't they, the yard was level?

A. Yes, sir.

Q. Cars would stand anywhere there without a brake?

A. Yes, sir, they will.

52 Q. So there wasn't even a water grade, probably?

A. No, sir.

Q. Now, you take two cars like that with your couplers in good

condition and you are backing up say four miles an hour, and even if the engine slackened its speed a mile or even two miles an hour, you don't wish to be understood as saying that the couplers couldn't be uncoupled with a pin-lifter if they were in good condition, do you?

A. If he had the slack he could pull them anyway.

Q. You keep saying "if." I am talking to you as an experienced railroad man. Don't you know that if you were backing two cars at that rate, four miles an hour, and the engine slacking down two miles an hour, that those two couplers between those cars could be uncoupled with great ease while running?

A. If they had the slack.

Q. Well, they will have the slack running four miles an hour and——

A. Well, if he couldn't pull the pin at two miles an hour you couldn't pull it down at all.

Q. Well, when you are slackening down from four miles an hour to two, in what way does it tighten up and keep tightened?

A. Why, the engine holding the cars back, if you slacken the engine down before the pin was pulled it will take the slack out.

Q. That is, we are assuming now you are operating without brakes. Did you have air in these cars?

A. No, there is no air.

Q. What did you have on this engine, straight air or automatic or both?

A. We had both.

Q. What do they use there ordinarily—the engineer—in making these switches—straight air?

A. Well most of them use straight air.

53 Q. Well, in either event they would set the brakes by the air or the automatic?

A. Yes, sir.

Q. That would slacken the speed first?

A. Yes, sir.

Q. But it would only be a fraction of a second before it would begin to slacken the speed of the car?

A. Yes, sir.

Q. And almost instantly the slackening of the speed of the first car would pull the slack out between the first and second car?

A. Yes, sir.

Q. And almost instantly it would slacken the speed of the second car?

A. Yes, sir.

Q. And the whole train would come down to two miles an hour, everything would be moving two miles an hour, assuming it was running four when they began to slacken up, almost instantly it would slacken down to two miles an hour?

A. Yes, sir.

Q. And just the minute they get down to two miles an hour the slack in between those two cars would play loose?

A. Yes, sir.

Q. And you could pull that pin any minute, if it worked right?
A. Yes, sir.
Q. And you can't conceive of any reason for a man going in between those two cars to make a coupling excepting that the pin wouldn't lift, can you?
A. That is all.

Redirect examination.

By Mr. MUNN:

Q. You have been asked some questions about the number of cars; there is quite a difference between what you can theorize on a car and operating actually. If the engine is running four miles an hour and is pushing two cars, we will say, that weigh two or three tons apiece, and the engineer begins to slack the speed of the engine, what happens, so far as those cars are concerned?
54 A. The slack would run out.
Q. Run right out and draw this up like that, wouldn't it?
A. Yes, sir.
Q. And you couldn't lift those pins then?
A. No, sir.
Q. And that will continue in that condition until the speed of the engine has become greater than the speed of the car, until they come together again?
A. Yes, sir.

Objected to as leading.
Mr. MUNN: This is redirect, and I submit it is on the cross you have had here.

Q. Now, the question of whether or not that pin could be pulled depends entirely upon the relative speed of that engine and those cars, doesn't it?
A. Yes, sir.
Q. As to whether the engine was running faster or slower than those cars?
A. Yes, sir.
Q. And when you said that it could be pulled out any instant did you wish to be so stating?
A. Any instant they had the slack.
Q. The slack is up, of course. Now, if Mr. Poppler had given the signal to the engineer to slacken up or stop before he tried to lift that pin, and the engineer actually began to slacken, that would be bound so he couldn't lift it?
A. The slack would run out so he couldn't lift it.
Q. And that would remain that way until the speed of the engine had again become greater than the speed of the car?

Objected to as leading and suggestive. I think he can state the facts as to what occurred.
The COURT: The same thing he said before. I don't think
55 it is prejudicial, it helps to get it clearer in this way.

Q. Would that condition have remained until the speed of the engine became greater than the speed of the car?

A. Yes, sir, you couldn't——

Q. What do you mean by "yes sir, you couldn't?"

A. I mean you couldn't pull the pin until you had the slack again.

Q. Now, you have been questioned a good deal about the result of your examination of that pin after this accident was over; whose duty was it to report to you that that coupling pin or appliance was out of order?

A. Why, it was nobody's duty, I guess, to report to me.

Q. The brakeman who found it?

A. Well, I was looking at it myself.

Q. Supposing the brakeman discovers that the coupler arrangement doesn't work, what does he have to do, keep still about it or report it to you?

A. Report it.

Q. To whom?

A. Report to me or the car man there.

Q. And he is the one who naturally finds it out first, isn't he?

A. Yes, sir.

Q. State whether or not it is his duty when he discovers that to stop that train right there and report it.

A. No, it wouldn't be.

Q. What?

A. No, it wouldn't.

Q. What would he have to do?

A. Well, he could leave them there until he made up the train, then he could report it; he wouldn't need to stop in the middle of his work.

Q. Well, he wouldn't go on and try to use that himself, would he?

A. No, he wouldn't.

56 Q. You were asked whether or not you had attempted to uncouple or have cars uncoupled while in motion for the past two or three or four years, and you said you hadn't; and you were asked as the result of an accident; it is also the result of a rule in force for several years on the Soo road?

A. Yes, sir.

Q. Since 18—When?

A. I don't remember the date.

Q. Was there a circular put out in 1908 as to this?

Mr. ANDERSON: I object to that as no proper foundation laid in the pleadings; I haven't seen anything in the pleadings about rules or publications.

Mr. MUNN: We don't have to plead that.

Mr. ANDERSON: I would like to know why not.

The COURT: Well, he testified on cross-examination that he hadn't done it for a number of years on account of some accident they had.

Mr. MUNN: That is the cross-examination. Now I am trying to find out all about that.

Q. Was there a circular put out on that in 1908?

Objected to as no proper foundation laid in the pleading, not re-direct examination and not within any of the issues of this case.
Objection overruled. Exception by plaintiff.

A. There was such a bulletin put out as that.
Q. And is that one of the reasons why you don't do that now?
A. Yes, sir.

Mr. ANDERSON: One moment. I object to it on the same grounds, and on the further ground that the bulletin or rule, whatever it is, is in writing and speaks for itself.
Objection overruled. Exception by plaintiff.

A. There was such a rule as that.
57 Q. I say is that one of the reasons why you no longer do it?
A. Yes, sir.
Q. When Mr. Poppler found that this pin wouldn't lift—assuming that he so found—how long would it have taken him to have stopped that engine and those two cars and have either uncoupled while they were standing still or gone around on the other side and uncoupled?
A. Just a couple of minutes; a minute or two.
Q. A matter of a very brief space of time, wasn't it?
A. Yes, sir.
Q. And that would have been the safe way of doing it, wouldn't it?

Mr. ANDERSON: Now, just a moment. I imagine that is a question for this jury and not for this witness to pass upon.
Mr. MUNN: Well, I think we are entitled, under the cross-examination, to have the witness testify on that.
The COURT: Well, I think it is obvious if the train had stopped that there wouldn't anything have happened.

Q. You were questioned at some length on cross-examination regarding reporting cars if you found where the pins worked hard; now, as I understand it, you didn't find anything out of order with this pin or coupling apparatus when you examined it excepting that it didn't work easily?
A. I couldn't find nothing out of order, no.
Q. Did you find what caused it to work hard?
A. No, I couldn't.
Q. You couldn't discover any bend in it anywhere?
A. No, sir.
Q. When you say it worked hard, what do you mean,
58 that it worked not as easily as the average, or considerably harder than the average?
A. Harder than the average.
Q. But did it work any harder than they frequently do?
A. No; it didn't.
Q. You don't remember what kind of a coupler that was?

A. No, I couldn't state now.
Q. The one on the other car worked with the usual ease?
A. Yes, sir.
Q. And was in good condition in every way?
A. Yes, sir.
Q. You remember that?
A. Yes, sir.
Q. That would be on the east end of the west car?
A. Yes, sir.
Q. I believe it has been described by Mr. Kornell—I am not sure, that these lifters—that there is one on each end of each car?
A. Yes, sir.
Q. And they are on diagonally opposite corners?
A. Yes, sir.
Q. That is, assuming that a car which faces east and west, for instance, and as you face toward the end of that car the lifting-lever is always on the right-hand side of the car, isn't it?
A. I didn't understand that.
Q. I thought you wouldn't. Assuming, to illustrate, that this book is the car; now, as we stand facing the end of the car, on which corner of the front end of the car would that lifting-lever be, the right-hand or the left-hand side?
A. It would be on the right.
Q. On the right. Switch it around this way brings it right over here again; that is the way they are, on the right-hand front side and the left-hand rear side as you face the car?
A. Yes, sir.

59 Recross-examination.

By Mr. ANDERSON:

Q. You were asked about the coupler on the other car; did you try the coupler on the west car that was being kicked?
A. Yes, sir.
Q. What did you try that for?
A. Just to see if it worked.
Q. Did anybody tell you to?
A. No, sir.
Q. You are quite sure you tried it?
A. Yes, sir.
Q. Do you remember anything about one of those cars being a boxcar and being something crooked in the end and reaching out over the coupler; do you remember anything about that?
A. I don't remember anything about it, no.
Q. Mr. Munn was asking you about the position of the couplers; the front coupler on each car is always on the engineer's side, isn't it? I mean the pin-lifter.
A. Yes, sir.
Q. Is always on the front corner of each car on the engineer's side?
A. If you were going ahead.

Q. Well, I mean running ahead.
A. Yes, sir.
Q. Engines usually run ahead on the road; I mean out on the road with your engine running ahead.
A. Yes, sir.
Q. And always on the rear end on the fireman's side?
A. Yes, sir.

Ross C. BETHEL, sworn on behalf of defendant, testified:

By Mr. MUNN:

Q. Mr. Bethel, you are register of deeds up at Mahnomen now?
A. Yes, sir.
Q. And you have been for how long?
A. Somewhat over a year; a year and two months.
Q. You used to be in the employ of the Soo road?
A. Yes, sir.
60 Q. As station agent at Mahnomen?
A. Yes, sir.
Q. You were the station agent at Mahnomen in September, 1909?
A. I was.
Q. At the time that Mr. Poppler was injured in the yard there?
A. Yes, sir.
Q. You didn't see the accident, I suppose?
A. No, sir, I didn't.
Q. You were up at the station. Did you go down there shortly afterwards?
A. Why, I went down there, I should judge, about 9 o'clock.
Q. Was that after they had taken Mr. Poppler away?
A. Yes, sir.
Q. Did you arrange about sending him down to Detroit?
A. No, I didn't.
Q. He was taken down to Detroit on the engine there?
A. Yes, sir.
Q. And about what time of day was it this accident happened?
A. Well, I couldn't say exactly; I came to work about 8 o'clock in the morning.
Q. That was after the accident happened?
A. Yes, sir.
Q. Oh, I see.
A. My night operator was on duty at that time.
Q. He stays until 8 in the morning?
A. Yes, sir.
Q. And you would come on at 8 and stay until what time?
A. Well, I staid until I got my work done, and sometimes I staid late.
Q. Well, did you notice how many cars were standing down there on the sidetrack when you went down?
A. No, sir.
Q. You went out to the point of the accident, did you?

A. No, sir, I went down and examined the track and made a report of it to the superintendent, as per his request.

61 Q. Oh, I see, you didn't go down to examine the cars?

A. No, sir, I didn't.

Q. You don't know how many cars there were there, then?

A. I couldn't say. I got a telegram from the superintendent to locate the exact spot and notice if there was anything out of the way regarding the track, which I did, and further than that I made no report.

Q. Who were the car inspectors there?

A. Mr. Benson, I believe, was; he had charge; I don't know whether he had a deputy or not.

Q. You didn't go with them when they made their inspection, did you?

A. No, sir.

No cross-examination.

CHARLES A. BENSON sworn on behalf of defendant, testified:

By Mr. MUNN:

Q. Mr. Benson, where were you living in September, 1909?

A. At Mahnomen, Minnesota.

Q. What was your business?

A. I was car foreman.

Q. Car foreman of the Soo road there?

A. Yes, sir.

Q. How long had you been holding that position?

A. I had held that then since 1906, at Mahnomen.

Q. You are still in the employ of the Soo road?

A. Yes, sir.

Q. How long had you been at Mahnomen before that time?

A. Before the accident?

Q. Yes.

A. I came there in 1906.

Q. Do you remember the day of the accident?

A. Yes, sir.

Q. How soon after it occurred did you go down to where it happened?

A. It was about ten or fifteen minutes after 7 in the morning.

62 Q. About what time in the morning did it happen, do you remember?

A. I don't remember, because I wasn't there, but it was along about 6:45, I guess, or 6:40.

Q. And you went down ten or fifteen minutes after, you think?

A. After 7; I come to work at 7.

Q. You were on at 7?

A. Yes, sir.

Q. Well, at whose direction or suggestion did you go down?

A. Why, I heard of the accident when I come there, and I went up there to see where it was.

Q. Did you get any directions from anybody to inspect those cars?
A. Yes.
Q. Did you do it then?
A. Yes, sir.
Q. How soon after the accident?
A. Oh, it was probably thirty minutes, or forty.
Q. Thirty or forty minutes after the accident?
A. Probably about that time—an hour.
Q. Where were these cars standing?
A. Why, they were standing on the sidetrack there.
Q. How many of them were there?
A. Two.
Q. Two cars?
A. Yes, sir.
Q. And on what track were they?
A. I think they were on two.
Q. And you think they were on two?
A. Yes, sir.
Q. Are you sure about that,—two or three?
A. I am pretty sure they were on two.
Q. Well, does No. 3 lead off from 2?
A. Yes.
Q. What?
A. Yes. No, it don't. Yes, there is one, then two and three.
Q. Well, what does three lead off from?
A. That leads off from 2, and then leads off from 3.
Q. Now, you think they hadn't got down to No. 3 lead then?
A. They hadn't got on 3 lead; they were in clear when I seen the cars.
63 Q. What were these cars, do you remember?
A. Yes, sir.
Q. What were they?
A. Michigan Central and N. P., Northern Pacific.
Q. Were they both box or one flat and one box?
A. No, sir, they were two boxes.
Q. There wasn't any flat-car there at all?
A. No, sir, not with those cars; there was only the two there, standing.
Q. What?
A. There was only the two there and they were two box-cars.
Q. You don't know how many cars were on that engine when they backed in there?
A. No, sir.
Q. Did you examine the pins on those cars?
A. The couplers?
Q. Yes.
A. Yes, sir.
Q. How did they work?
A. All right; no defects.
Q. What?

A. There was no defects in them.
Q. Did you try on each end of each car?
A. Yes, sir.
Q. Were there any cars down on track No. 3 at that time?
A. I didn't notice if there was; they were quite a ways away because these two were right—just clear.
Q. Were they right at the point of the accident? Could you see where the accident occurred from the blood there?
A. Well, yes, I could see a little of it, not very much; it was quite a while afterwards, you know.
Q. Well, were they near the point of the accident?
A. Was I near?
Q. Were those cars close by where you could see the accident happened?
A. Why, they weren't very far.

64 them leads are from where it happened; I should judge it would be probably forty or fifty feet or so, I should think.
Q. How far apart were the cars?
A. About five feet or so; weren't very far—oh, somewheres between five and six feet apart when I seen them.
Q. Who was in charge before you came on?
A. Wentz.
Q. Was he the night——
A. He was the night car repairer.
Q. And you were the day car repairer?
A. Yes, sir.
Q. Was he there with you?
A. Yes, sir, in the morning.
Q. Was he there when you got there?
A. He was at the depot platform.
Q. He went down there with you?
A. Yes, sir.
Q. You say you lifted the pins on each end of each one of these cars?
A. Yes, sir.
Q. And examined them?
A. Yes, sir.
Q. Made a thorough inspection of them?
A. Yes, sir.

Cross-examination.

By Mr. ANDERSON:

Q. How many other cars were standing around there in the vicinity?
A. There wasn't any that I noticed unless they were quite a ways up in this yard.
Q. Was this a large yard?
A. Yes, sir, quite large.
Q. Let us get the tracks there: There is a lead track there, isn't there?

A. Yes, sir.
Q. Well, this accident happened on the lead, didn't it?
A. Yes, sir, that is, before he got to No. 2.
Q. That is, there is a switch known as No. 2, isn't there?
A. Yes, sir.
65 Q. Leading off from the lead on to No. 2 track?
A. Yes.
Q. Now, is there a switch known as No. 3 switch?
A. Yes, sir.
Q. And that leads off from the lead?
A. Leads off from the lead, yes, sir, on No. 2 track.
Q. That is, No. 2 and No. 3 tracks are parallel, aren't they?
A. No. You see the lead forms—No. 2 goes up and then it goes on lead, and No. 3 goes up.
Q. Where does No. 3 begin, on the lead?
A. Yes.
Q. Just the same as No. 2?
A. The way I understand, all the lead is where the switches work out from the lead.
Q. Well, you know what the lead is?
A. Yes, sir.
Q. It is the track that the switch is on that you throw to turn you on to the various numbered tracks?
A. Yes, sir.
Q. Is there a No. 1 track?
A. Yes, sir.
Q. And then No. 2?
A. Yes, sir.
Q. And passing down the lead farther you come to No. 3?
A. Yes. sir.
Q. And then 4?
A. Yes, sir.
Q. And so on up until you come to your entire number, whatever there were?
A. Yes, sir.
Q. How many tracks did you have there?
A. Four. No. Yes, four.
Q. Four. Now, do those, 1, 2, 3 and 4, all lead off from the lead on the same side of the lead track?
A. Yes, sir.
Q. And as you are moving west on the lead track where are these tracks 1, 2, 3 and 4, on your right-hand side or on the left?
A. They are on the left-hand side as you come up the lead.
Q. That is, going west, now?
A. Going north.
Q. Well, somebody said west. Which way does the lead
66 run?
A. Why, the lead runs kind of northeast and the tracks runs very near straight north, about straight north.
Q. That is, the lead runs northeast and southwest?
A. Yes, off from the main line.

Q. Which way would the train be moving to kick or shu-t cars in on tracks 2 and 3?
A. They would move north.
Q. They would have to move north?
A. Yes, sir.
Q. Now, as you move north do the tracks lead off to the right or to the left?
A. To the left of the lead.
Q. And you found these cars you are speaking of on track 2?
A. I think it was 2, yes, sir.
Q. They were both box-cars you are talking about?
A. Yes, sir, they were both box-cars.
Q. Now, what cars were there on track 3 at that time?
A. I didn't notice any.
Q. What other cars were there on track 2?
A. I didn't notice any.
Q. Was the yard empty?
A. I didn't pay no attention to that.
Q. That is what I want to get at. Can you say whether there were ten cars or a hundred cars?
A. No, sir.
Q. Can't tell anything about it?
A. No, sir.
Q. How did you pick out the two cars to examine?
A. Because I was told.
Q. Who told you?
A. My car repairer, the night man.
Q. That is, he was there somewhere in the yard at the time of the accident?
A. Yes, sir.
Q. Had he been around the cars, did you understand it?
A. Why, he was there at the accident, at the time it happened, and the cars wasn't touched.
67 Q. That is, they told you they were not touched?
A. Yes.
Q. You don't know anything about it?
A. I wasn't there at the time of the accident, no, sir.
Q. Now, you heard the testimony of the conductor, Leach?
A. Yes, sir.
Q. How he went and examined the cars, and he claimed at the west end that car coupler worked hard four hours after.
A. Four hours after?
Q. After the accident. There was nothing that would make it work hard between the time you examined it, if you examined the same car, in four hours?
A. No, sir.
Q. There was nothing about the weather that would make it get rusty during that short time?
A. No, sir, I don't think so.

Adjourned until the morning of February 7, 1912.

WILLIAM H. WENTZ, sworn on behalf of defendant, testified:

By Mr. MUNN:

Q. Mr. Wentz, what was your business in September, 1909?
A. I was night car repairer.
Q. Where?
A. Mahnomen.
Q. For the Soo road?
A. Yes, sir.
Q. Were you in Mahnomen when this accident happened to Mr. Poppler?
A. Yes, sir.
Q. Where were you at the time?
A. I was on the left-hand side of the track, walking down.
Q. How far from the point of the accident?
A. Just about—well, let's see, about sixty feet.
Q. Which way was that engine and those cars backing?
A. Backing north.
Q. Which way were you walking?
A. Walking north.
68 Q. On which side of the train were you when the accident happened as to Poppler? Were you on the same side he was on, or on the opposite side?
A. I was on the same side, on the east side.
Q. That Poppler was on?
A. Yes, sir.
Q. Were you there when the accident happened or had you crossed over?
A. Sir?
Q. Were you there when the accident actually happened? Is that where you were when it happened?
A. Yes, sir.
Q. And where were you in relation to the engine?
A. Which?
Q. Where were you in relation to the engine when the accident happened?
A. Around the front end.
Q. Near the front end of the engine?
A. Yes, sir.
Q. How many cars were being backed in there at that time?
A. Two.
Q. And on which track was the engine and cars when the accident happened?
A. They were on No. 2.
Q. Is that the lead track, as they call it?
A. No, it is the switch.
Q. They had got off from the lead track?
A. They were off, leaving the lead track, going on to No. 2.
Q. They were leaving the lead track, going in on No. 2?
A. Yes, sir.
Q. Did you see Poppler just as he was run over?

A. No, sir.
Q. Why not?
A. The engine went by me where the cylinder is, and there was steam escaping, and I couldn't see Mr. Poppler for the steam.
Q. What first attracted your attention, if anything?
A. Well, the time of the accident?
Q. Yes.
A. I heard somebody yell, at least I thought I did, I wasn't certain.

Q. And when the steam cleared away what did you see
69 and where were you and what had happened?

A. I seen Poppler laying aside the track.
Q. Had the engine stopped by that time?
A. Yes, sir.
Q. Did you help take Mr. Poppler away?
A. I helped to move him away from the track a ways, just a little bit.
Q. Well, where did you go after that?
A. After that I went after an old cot down towards the depot.
Q. Well, did you come back to those cars shortly afterwards?
A. Yes, sir.
Q. How soon?
A. Not over two minutes or so; three minutes, about.
Q. Two or three minutes. What had happened in the meantime so far as those cars were concerned; had they been uncoupled from the engine?
A. No, sir, not the first car wasn't uncoupled from the engine.
Q. When you got back it was still on the engine?
A. Yes, sir.
Q. Now, did they uncouple it?
A. Well, I couldn't say; they must have uncoupled it, because I wasn't there when they uncoupled the engine from the first car.
Q. Well, the engine moved away, did it?
A. Yes.
Q. Did it leave those two cars there?
A. Yes, sir.
Q. You remember that, do you?
A. Yes, sir.
Q. And did you inspect those cars right there?
A. No, not at the present time, I didn't.
Q. How soon after the accident was it?
A. I should judge about thirty minutes, probably not that much.
Q. You received instructions in the meantime to do it?
A. Yes, sir.
Q. Who was with you when you inspected those cars?

A. Mr. Benson and Mr. Rooth.

70 Q. Mr. Benson was the gentleman who was on the stand yesterday?

A. Yes, sir.
Q. He is the day car inspector or repairer, is he?
A. Yes, he is the day foreman.

Q. Day foreman?
A. Yes, sir.
Q. And he came on that morning?
A. Yes, sir.
Q. And he was there with you at the time you say you inspected those cars?
A. Yes, sir.
Q. And the two cars you inspected are the same two cars that were on the engine at the time Mr. Poppler was hurt?
A. Yes, sir.
Q. You are sure about that?
A. Yes, sir.
Q. What were they, box or flat-cars?
A. Box-cars.
Q. Both of them box-cars?
A. Yes, sir.
Q. Well now, what did you do, you and Mr. Benson, and Mr. Rooth, inspecting those cars?
A. Well, I didn't do anything in particular there, that is, I was along with them, and Mr. Benson was trying them the first.
Q. Well, what did you do about the coupling-pins and the knuckles?
A. We examined these.
Q. Did you do that yourself?
A. After Mr. Benson did.
Q. Well now, what did you do?
A. Well, I would close them up and open them, pull them open.
Q. Did you see Mr. Benson do that too?
A. Yes, sir.
Q. On which end of the cars?
A. On both ends of the cars, we was supposed to open, uncouple.
Q. That is, both ends of both cars?
A. Yes, sir.
Q. How did those knuckles on the lifting-bar or lever work?
A. They worked very easy; that is not—according to the way they generally all work.
Q. Was there anything out of order with them that you could discover anywhere?
A. Not that we found.
71 Q. Did any of them work harder than the others or did they all work about alike?
A. Just about the same.
Q. Was there anything out of order with those knuckles, lifting-lever, pin or anything connecting with the coupling-apparatus on those two cars as you inspected them there at that time?
A. No.
Q. What?
A. No, there was nothing.
Q. Who was Mr. Rooth?
A. Round-house foreman.

Q. And this inspection, you say, was made within a half hour after the accident?
A. About that time.
Q. And of the same two cars that were on the engine at the time the accident happened?
A. Yes, sir.
Q. That you are sure of?
A. Yes, sir.

Cross-examination.

By Mr. ANDERSON:

Q. What were your duties?
A. Night car repairer.
Q. Night what?
A. Car repairer.
Q. Well, what does that mean? What do you have to do?
A. Repair cars.
Q. How about couplers?
A. Inspect them all and look them over.
Q. It was your duty to inspect couplers and to see if they were in proper condition?
A. Yes, sir.
Q. And if any car had a coupler and they were moving it, that would mean you had overlooked it and had inspected it?
A. Well, in that line, yes, sir, it would have been overlooked.
Q. You are the man that was responsible for them in the night time?
A. Yes, sir.
Q. And Benson in the day time?
A. Yes, sir.
Q. And you two men were the men who had the responsibility for that at all times?
A. Yes, sir.
72 Q. From whom did you get instructions that morning to inspect the couplers on these two cars?
A. I got instructions to come with Mr. Benson——
Q. Well, who gave you the instructions?
A. Mr. Benson.
Q. Where did he get them, do you know?
A. I don't know where he got the instructions from.
Q. Well, how soon after the accident did Mr. Benson instruct you to go with him to inspect the couplers on those cars?
A. About thirty minutes.
Q. Then you went right down as soon as Benson told you?
A. Yes, sir.
Q. You don't know where Benson got his orders?
A. No, sir.
Q. Do you know why? Had anything occurred between the time of the accident and thirty minutes afterwards, so far as you know,

that would cause either you or Benson to inspect the couplers? In other words, why did you go and inspect the couplers?

A. To find out the defects, if there was anything the matter with them.

Q. Well, you had reason, then, to believe that there was some defect in the coupler?

A. Well, it was our duty to find out.

Q. Well, but why did you inspect the couplers rather than some other part of the car or the tracks or things of that sort?

A. Well, didn't find defects in other parts before.

Q. Had you inspected the track?

A. The track—we had nothing to do with the track.

Q. Well, had you made any inspection of anything except the couplers?

A. Yes, sir; that is, we had when the train come in the evening before——

Q. No, no, I mean after this accident did you inspect anything except the couplers on these cars?

A. No, we didn't.

73 Q. So that you and Benson went directly down to these cars to find out whether there was a defective coupler on one of those cars?

A. Yes, sir.

Q. And the reason you did that was because you had something occur that made you believe the accident was caused through some defective coupler?

A. Well, we wanted to find out.

Q. What made you think it was the coupler?

A. Well, I don't know what made me think it was the coupler; it was in our place to inspect it and give our report.

Q. And if the coupler had been out of order the responsibility would have rested upon your shoulders and Benson's, wouldn't it?

A. Yes, sir.

Q. And you knew that when you went down to inspect the couplers?

A. Yes, sir.

Q. You say you didn't find anything wrong with them?

A. Yes, sir.

Q. You say they worked as good or as smooth as they generally work, is that what you mean?

A. Yes, sir.

Q. Just how did you make the inspection of the coupler on the north end of the car that had been coupled to the engine?

A. Well, we closed the knuckle and pulled the lifting-rod.

Q. Well, is it the first thing you did, close the knuckle?

A. Well, I don't remember whether we closed the knuckle or whether the knuckle was shut.

Q. I noticed you said on direct examination and cross-examination you closed the knuckle.

A. Yes, sir.

Q. Now, is it your best recollection that that knuckle was open when you went down to examine that coupler?

A. I don't remember whether it was open or closed.

74 Q. Well then what was the first thing you did do in your inspection process?

A. Well, we tried whether it would work easy.

Q. How did you try it?

A. Well, either, if the knuckle was open we closed it and pulled the lever to see whether it would work easy, to open.

Q. You have no recollection whether the knuckle was open or not?

A. No, sir, I don't.

Q. Did you make a report?

A. I did not.

Q. As inspector, if you found a knuckle there or a pin, or a block or lock that corresponds to the pin, that wouldn't work when you pulled on the lever, you would call that a bad-order knuckle, wouldn't you?

A. Yes, sir.

Q. And if you had to pull away on the pin as the car stood there in order to raise it, that would be bad-order, wouldn't it?

A. Yes, sir, on that car.

Q. You were required to keep them in easy working condition?

A. Yes, sir.

Q. Now, what make was this coupler on the north end of the car next to the engine?

A. I don't remember what the make of it was, because——

Q. Wasn't it your duty to inspect and report as to the make of the coupler?

A. Well, I didn't have no report to make out; it was Mr. Benson that had that in charge then.

Q. I know, but you and Benson together; one of the first things to do is to make a report and tell what make the coupler was?

A. Yes, sir.

Q. Yet you can't tell us what make it was?

A. No, sir.

Q. Don't know whether it was a Washburn or Trojan or——

A. No, sir.

Q. Don't know whether it had a lock-pin in it or not?

A. I ain't certain of that.

75 Q. What couplers have lock-pins?

A. Well, the Washburn and some others.

Q. Name some others besides the Washburn. Has the Washburn a lock-pin?

A. Yes, sir.

Q. What others have a lock-pin?

A. Well, I don't remember, because it is over two years since I have been on the work.

Q. How long did you inspect couplers, how many years?

A. I didn't inspect very long; it was, I should judge, about seven months.

Q. Has the Tower coupler got a lock-pin?
A. No, sir.
Q. Are you sure?
A. Not as I know of.
Q. Well now, a Tower coupler has a lock-pin, hasn't it? It is the first coupler that was made that had a lock-pin, isn't it?
A. Well, it might have been a different style; I couldn't say for certain.
Q. Were these couplers equipped with pins or locks or blocks?
A. Blocks.
Q. Didn't have a pin at all?
A. No.
Q. Simply had a link connected with the top of the block, didn't it?
A. As much as I can understand, yes.
Q. You remember now it didn't have a pin?
A. Well, I remember that part, but I don't remember the make of the coupler.
Q. Was it the same kind of a coupler that was on the south end of the second car that was on the north end of the first car?
A. I couldn't say.

Redirect examination.

By Mr. MUNN:

Q. You didn't make any report of this yourself at all?
A. No, sir.
76 Q. Had you heard stated there why or how Poppler claimed why he went between those cars?
A. Sir?
Q. Had you heard it stated that Poppler claimed he tried to lift the pin and couldn't?
A. Yes, sir.
Q. Was that one of the reasons why you were down there inspecting those pins or couplers?
A. Yes, sir.

PETER ROOTH, sworn on behalf of defendant, testified:

By Mr. MUNN:

Q. Mr. Rooth, what is your business?
A. Round-house foreman.
Q. And what was it in 1909?
A. Round-house foreman.
Q. Where about?
A. At Mahnomen.
Q. Working for the Soo road?
A. Yes, sir.
Q. Do you remember the morning the accident happened to Mr. Poppler?
A. Yes, sir.

Q. Where were you at that time?
A. I was coming from the round-house, I was going over towards the depot.
Q. And how far is that from the point of the accident?
A. Why, I should judge about fifteen car lengths.
Q. What first attracted your attention to the fact that an accident had occurred?
A. I didn't know nothing about it until Mr. Benson asked me to go down for inspection.
Q. You didn't see it and knew nothing about it until Mr. Benson asked you to go down there; did you go down with Mr. Benson and Mr. Wentz when they went down after the accident?
A. Yes, sir.
Q. You heard them on the stand?
A. Yes, sir.
Q. Were you present when they examined the coupling appliances on those cars?
A. Yes, sir.
Q. Did you yourself try them?
77 A. Yes, sir.
Q. What did you do?
A. I lifted the pin and worked the knuckles; saw they worked all right.
Q. How did the coupling appliances on those cars work when you were there?
A. Seemed to work all right, same as any other coupler.

Cross-examination.

By Mr. ANDERSON:

Q. You work for the company now?
A. Yes, sir.
Q. What is your position?
A. Round-house foreman.
Q. Same place?
A. No.
Q. Where?
A. Harvey, North Dakota.
Q. Harvey?
A. Yes, sir.
Q. Did you make a report of your examination?
A. I did not.
Q. Did you have anything to do with the inspection?
A. No, sir.
Q. Do you know why Benson wanted you to go down there?
A. Why, it is customary when anything happens that way to go and examine everything to see——
Q. Customary for whom?
A. For the foreman.
Q. Foreman of what?
A. Of the department.

Q. You are the foreman of the car inspection department, are you?

A. No, sir, he just took me down there to see if the cars were all right.

Q. Well, I mean did Benson give any reason for asking you to go down?

A. Yes, he said he wanted me to go down and see if the cars were O. K.

Q. He said that, did he, wanted you to go down and see that the cars were O. K.?

A. Yes, sir.

78 WILLIAM C. RANOUS, sworn on behalf on defendant, testified:

By Mr. MUNN:

Q. Mr. Ranous, what was your business in the spring and summer of 1908?

A. I was a railroad employe.

Q. Working for whom?

A. For the general superintendent, Soo Line.

Q. Of what road?

A. Soo Line.

Q. The general superintendent of the Soo Line?

A. Yes, sir.

Q. And who was the general superintendent at that time?

A. Mr. G. R. Huntington.

Q. You were his chief clerk?

A. Chief Clerk, yes, sir.

Q. Whose duty was it, or who would send out the circulars that would be issued to train employes regarding their conduct in handling trains?

A. A circular of that kind which covered the entire railroad, Mr. Huntington would send out.

Q. That is, the man you were chief clerk for?

A. Yes, sir, general superintendent.

Q. I will ask you whether or not during the spring or early summer of 1908, there was issued by Mr. G. R. Huntington, as general superintendent of the Soo Railway Company, circular, general superintendent's circular No. 176.

A. May I see the circular, please? (After looking at Defts. Ex. 3.) Yes, sir.

Q. I show you Def't's Ex. 3 and ask you if that is a true copy of the general superintendent's circular No. 176, sent out during the spring of the year 1908 by the general superintendent of the Soo road.

A. Yes, sir, it is.

Q. And I notice there is a receipt attached to the bottom of that.

A. Yes, sir.

79 Q. Did that accompany it?

A. Yes, sir.

Q. And what was to be done with that receipt?
A. It was to be returned to our office.
Q. By the employe who would receive the circular attached to it?
A. Well, the circular was sent out by the superintendent for distribution, and the receipt was returned to the superintendent.
Q. It was to be the receipt of the employe?
A. Yes, sir, it was the receipt of the employe.
Q. Now, I show you Def't's Ex. 2, and ask you if that is the receipt for this circular.
A. Yes, sir, it is.
Q. And is the circular referred to in Def't's Ex. 2, the circular, a copy of which is marked Def't's Ex. 3?
A. Yes, sir.

Mr. MUNN: Offered in evidence. (Def't's Ex. — and 3.)
Mr. ANDERSON: Objected to on the ground it is incompetent, irrelevant and immaterial, and on the further ground that there is no foundation laid for the introduction of such evidence in the pleadings.
Mr. MUNN: Before that is ruled upon I will ask one more question.

Q. The general circular referred to in the receipt Ex. 2 is the circular which is received by the person who signs the receipt and is retained by him?
A. Yes, sir.

Mr. ANDERSON: The Court will understand when I make the objection no foundation laid in the pleadings, there is not a word in the pleadings in regard to rules, bulletins or anything of that sort, nothing to put the plaintiff on his guard, or the violation of any rule in any way, shape or manner.
Mr. MUNN: There is a general allegation of contributory negligence.
80 Mr. ANDERSON: I know there is a general allegation of contributory negligence, but they couldn't prove a verbal order from the superintendent to do or not to do a certain thing; they have to plead these orders.
The COURT: Even then, wouldn't it bear on the question of contributory negligence—warning or notice not to do this thing?
Mr. MUNN: That is all it is.
The COURT: Objection overruled.
Mr. ANDERSON: Note an exception.

No cross-examination.

JAMES S. CONROY, sworn on behalf of defendant, testified:

By Mr. MUNN:

Q. Mr. Conroy, where were you living in September, 1909?
A. Living at Mahnomen, Minnesota.
Q. And what were you doing there?
A. I was section foreman.

Q. For what road?
A. For the Soo Line.
Q. Do you remember the day that Mr. Poppler was hurt there?
A. Yes, sir.
Q. Where were you?
A. I was just coming down to the depot.
Q. Where from?
A. From my house, section house.
Q. You didn't see the accident?
A. Well, no; I seen him switching there, but I didn't see the accident.
Q. How soon after the accident did you get there?
A. Well, about twenty minutes.
Q. Were you down at the cars with Mr. Wentz and Mr. Benson and Mr. Rooth, inspector?
A. Yes, sir.
Q. Were you there when they did that?
A. Yes, I was there when they done it, and I was work-
81 ing right in there all the forenoon pretty near, around these cars.
Q. Did you see them doing this?
A. Yes, sir.
Q. Did you see them lifting the pins?
A. Yes, sir.
Q. And testing the coupling appliances?
A. Yes, sir.
Q. Did you try them yourself?
A. Yes, sir.
Q. How did they work?
A. They worked all right from what I could see.
Q. You couldn't detect any defect or anything out of order with them?
A. No, sir.

Cross-examination.

By Mr. ANDERSON:

Q. How long had you been working around these cars before Benson came?
A. Well, not very long.
Q. Well, how long?
A. Probably about ten minutes, maybe.
Q. What were you doing around the cars?
A. Why, I was working on my track there.
Q. You mean fixing up the track?
A. Fixing up, yes.
Q. What do you mean by "around the cars"—in that vicinity?
A. Yes, right in there on that lead and on those side tracks there.
Q. Doing your regular daily work?
A. Yes.
Q. That is what you mean by around the cars?

A. Yes, sir.
Q. What time did you start to work?
A. 7 o'clock.
Q. What time did Benson come down there?
A. Benson got there about 7 o'clock.
Q. Did Benson ask you to go over and see if the cars were O. K.?
A. No, sir.
82 Q. Just went over for curiosity yourself?
A. Yes, sir.
Q. What made you go over?
A. The accident happened; I had to make a report.
Q. What did you have to do with the cars?
A. Give the car numbers.
Q. Did you make a report?
A. Yes, sir.
Q. What were the car numbers?
A. I couldn't exactly tell you.
Q. Seen your report since you made it?
A. No, sir.
Mr. ANDERSON: Have you got it?
Mr. MUNN: No, I haven't it here.
WITNESS: I know they were foreign cars, but I can't just give——
Q. How close were those cars together that you and Benson and others inspected?
A. At the time we inspected them?
Q. Yes.
A. Oh, I should judge about four feet apart.
Q. Then one of them had been moved after Poppler was killed, hadn't it?
A. Well, I couldn't say that.
Q. Well, did you see where the accident happened, can you say, on the tracks?
A. Yes, sir.
Q. Blood marks?
A. Yes, sir.
Q. Was the car standing anywhere near the blood mark?
A. Well, about thirty feet from the first blood mark on the rail.
Q. The tracks are level there?
A. Yes, sir.
Q. Then if the cars had been uncoupled, as shown by the testimony, and the train was moving four miles an hour, of course the car would move more than three or four feet, wouldn't it?
A. I couldn't say.
Q. Well, you know from your own observation that a car when kicked along a level track runs more than three or four feet?
83 A. Sometimes the tracks are kinked and curved, a side-track, you know.
Q. What do you mean by kinked?
A. Crooked rail.
Q. Well, you don't let a crooked rail rest on the track?
A. Well, sometimes.

By Mr. MUNN:

Q. There is a curve off from each one of these leads, isn't there?
A. Yes, sir.
Q. You say you were down there doing your regular work when this accident happened?
A. No, I was coming down.
Q. And you started in to do your work when you found out this accident happened?
A. Well, I went over there to look over my tracks.
Q. How long was it after this accident had happened before you learned it happened?
A. Well, I was coming down there to work and seen them switching and seen them stop and turned that way.
Q. It is part of your business as a track foreman there to make a report on the condition of the track, isn't it, as well as the cars?
A. Yes, sir.
Q. And that is why you were up there?
A. Yes, sir.

DUNCAN LEACH, recalled on behalf of defendant, testified:

By Mr. MUNN:

Q. Mr. Leach, you say it was about four hours after the accident when you came back there and looked over two cars?
A. Yes, sir.
Q. And these cars you looked over were on the third track?
A. Yes, sir.
Q. Now, you think one of those was a flat-car?
A. Well, I looked my report over that I made out at that time and find that they were box-cars.
84 Q. Now, yesterday when you were on the stand you were asked this question, on cross-examination, and I am not sure, I haven't had a chance to examine the record as to what your answer was; you were asked whether or not a car where the lifting appliances worked hard you would report in as out of order. Do you wish to be understood as saying that where it worked the same way the one that you tried on this car that you would report things out of order?
A. No, I wouldn't report it out of order because they worked.
Q. You wouldn't report this in as being out of order?
A. No, sir.
Q. And you didn't report it in out of order?
A. No, I didn't. It worked.
Q. But you would report one in out of order that worked so hard you couldn't lift it?
A. No, sir.

Cross-examination.

By Mr. ANDERSON:

Q. How heavy are you?
A. 190.

Q. You are six feet tall, aren't you?
A. Yes, sir.
Q. Powerful man?
A. Yes, sir.
Q. And you wouldn't report a coupler in if you could work it?
A. If I could work it, and not work too hard so I could work it with one hand, I wouldn't report it in bad order.
Q. Well, of course, you lift coupling pins with one hand all the time, don't you?
A. Yes, sir.
Q. Night time, for instance, you have a lantern in the other hand, haven't you?
A. Yes, sir.
Q. And in the day time the other hand must be free, so as to give the signals?
A. Yes, sir.
Q. And so long as you can work a coupler and pull a pin, if you can get it up you won't report it as in bad order?
A. Without too much trouble.
Q. What do you call too much trouble?
A. Pulling it up, not put all my strength on it.
Q. How much strength did you put on this coupler four hours after the accident before you could lift it and open the knuckle?
A. I couldn't tell exactly how much strength; I just give it a pull like that.
Q. Does it work any easier today that it did yesterday in your mind?
A. This coupler?
Q. Yes.
A. Well, it worked.
Q. Have you got a notion in your mind today this coupler worked easier than you thought it did yesterday?
A. What is that question?
Q. Do you think today this coupler worked easier than you thought it did when you testified yesterday?
A. No, I think it worked just the same as it always did.
Q. You say you examined your written report?
A. A copy of it.
Q. Since you were here yesterday?
A. Yes, sir.

Mr. ANDERSON: Have you got it, Mr. Munn?
(Paper produced by Mr. Munn.)

Q. Well, when you examined the copy of your report yesterday it didn't refresh your mind at all in regard to the condition of the coupler, did it?
A. Well, just thinking it over, I remember not having much trouble with it.
Q. When you examined this copy of the report that you speak of, in what way did it refresh your mind as to whether the cars were box-cars or not?

Mr. MUNN: He has looked it up since.

Mr. ANDERSON: That isn't what he said.

Mr. MUNN: That is a copy of the report he examined; he looked them up since.

86 Q. Why have you said this morning that by examining your report you are of the opinion now that they were both box cars?

A. I was thinking it over; I remember they were.

Q. Well, examining the report you made, or copy of it, didn't help you think it over, did it?

A. I think it did.

Q. What is there on this copy of the report that Mr. Munn has handed me, what is there to tell you whether they were box cars or not?

A. Well, I am not familiar with them numbers there, but I remember of their being box cars now.

Q. Well, I am asking the question now: there is nothing on the report to help you, is there?

A. Nothing, except the numbers and the initials of the cars.

Q. All right, "Michigan Central," and there is a number given; do you know anything about the Michigan Central series of numbers and what they represent?

A. No, I don't.

Q. Do you know anything about the series of numbers of the Northern Pacific and what kind of cars they represent?

A. I know some of them.

Q. Well, what does that series of numbers represent, box or flat cars?

A. Box cars, the even numbers.

Q. Even numbers, box cars?

A. Yes, sir.

Q. Well, which car was next to the engine? It was the Northern Pacific car, wasn't it?

A. I wouldn't say as to that now.

Q. Why is it, in making this report, as conductor of this train, to the officials of the railroad company, why is it you said nothing whatever about the coupler and the fact that it worked hard? There is nothing in this report, this copy here, in regard to the
87 coupler at all; now, why is it that you didn't even mention it?

A. Why, the coupler worked all right for me.

Q. But you are asked to state anything in your idea about the cause of the accident; you didn't make any report on that, did you?

A. I don't think I did.

Q. Except he fell.

A. Except he went in between the cars and fell.

Q. But you made no report as to what caused him to fall or why he went in between the cars?

A. No, sir, because I wasn't there.

Q. Now, you were the conductor of this train, weren't you?

A. Yes, sir.

Q. And you were in a position to know what cars were being handled there that morning, weren't you, as conductor of the train?
A. I was at that time, yes.
Q. Well, I know; you had the train list?
A. No, the brakeman had the train list.
Q. You had the train list before you turned it over to the brakeman and had in this list two cars?
A. Yes, sir.
Q. You know the two cars you went down to examine were the two cars that were being handled, now, don't you?
A. I knew at that time.
Q. Well, I mean when you made the examination.
A. Yes, sir.

The defendant then rested, and this closed the testimony.

Mr. MUNN: If the Court please, I desire now to make a motion that the Court direct a verdict in favor of the defendant, on the following grounds:

First, that the plaintiff has failed to prove or establish any cause of action under the pleadings;

Second, that the testimony fails to establish any negli-
88 gence on the part of the defendant causing the injuries complained of sufficient to sustain a verdict;

Third, upon the ground that the testimony shows such negligence on the part of plaintiff's deceased contributing to or causing the injuries which resulted in his death as to preclude a recovery.

The motion was argued at some length.

The COURT: I think I will deny the motion. In regard to the first point you make, I don't say, of course, the allegation that he was working on the car, as it were, engaged in interstate commerce business, might be construed to be an allegation that he was an interstate servant; he might be and he might not. Then, the complaint, it seems to me, will sustain the action that has been tried, and that we are bound by the theory of the action that counsel has adopted, providing the allegations in this complaint are broad enough to sustain it, and I don't see why he is compelled to go to the jury on the other theory simply because there are some allegations in the complaint which might sustain an action on that theory, so long as it will sustain the one he has actually tried and submitted to the jury.

Exception by defendant.

Recess until 2 P. M.

After argument by respective counsel, the Court charged the jury as follows:

Charge.

Gentlemen of the jury, this action is brought to recover damages sustained in consequence of the death of one Richard S. Poppler, upon the ground claimed that his death was caused through some

negligence of the defendant in the manner in which its cars were
equipped at the time of the accident, which, as I recollect
89 it, occurred some time in September, 1909. The action is
based on a charge of negligence, and the negligence alleged and claimed consists, if at all, in the failure to have the cars which were in use at that time equipped with automatic couplers, as required by the federal statute, which will couple upon impact and which may be uncoupled without the necessity of a man going between the ends of the cars. The negligence alleged in this case is that the couplers in use were not in such a condition that they would uncouple without the necessity of a man going between the ends of the cars for that purpose.

It appears, without contradiction, I think, that the defendant is a railroad corporation, common carrier, engaged in interstate commerce business, and that at the time of the accident the deceased, Richard S. Poppler, was a brakeman in its employ; that on the morning in question he was engaged in making an uncoupling of a couple of cars which were in use by the defendant company at the time and being hauled by them, and that these cars were equipped with some sort of an automatic coupler. Some attempts had been made to comply with the federal statute. And the plaintiff has offered evidence tending to show that while he was engaged in this occupation and about to uncouple the cars he seized the pin-lifter or lifting-bar with which the car next the engine was equipped and tried three or four times to uncouple the cars, and that he so tried without success; that he then gave some stop signal, I believe, and immediately stepped in between the cars, and that while in there he pulled the pin of the coupler attached to the leading car, or car ahead of him, and that while in there he stumbled upon something which is not made clear, and fell down and the car went over him
and caused him such injuries that within a few hours there-
90 after he died. It is claimed that this coupler with which
that car was equipped was in such a condition that it wouldn't reasonably work or operate without the necessity of Poppler's going in between the cars, and that therefore the defendant was negligent in having the car and the coupler in that condition, and responsibility for the death of Mr. Poppler.

The defendant denies their liability. It is admitted, I think, that they are, as I have said, interstate carriers and bound to comply with the federal statute, but it is denied on the part of the defendant that the coupler was in bad condition. They have offered evidence tending to show that it was not in any defective condition; have offered evidence tending to show that immediately after the accident it was tried and experimented with, and that it worked all right, and they say that if it did not work when Poppler tried it, it was for some other cause not connected with the condition of the coupler itself.

Now, whether or not this coupler was in such a condition that it could be reasonably operated from the outside without requiring the operator to go in between the cars, is the first question with which you are confronted in this case, and in reference to this question the

burden of proof is upon the plaintiff to prove his side of the case by a fair preponderance of the evidence. This does not mean that the plaintiff is obliged to bring in here the greater number of witnesses or produce the larger volume of testimony, but it means that the evidence which the plaintiff produces to sustain the proposition that the coupler was in defective condition must be to some appreciable extent or some recognizable degree more forcible and more convincing than is the evidence against him on that proposition.

91 The evidence, as I have said, does not consist in bulk; the evidence is weighed and not measured, and, if you find for the plaintiff on this proposition, you must find by a preponderance of evidence; that is you must find that his evidence is to some recognizable degree and some appreciable extent more convincing than is the evidence of the defendant against him. The test of whether or not the coupler was in good condition, in my judgment, is, as I have indicated, whether or not it could be reasonably operated from the outside without requiring the operator to go in between the cars. The law provides that the coupler shall be in such a condition at all times that the cars can be uncoupled without requiring a man to go in between the ends of the cars. Now, if it could be operated from the outside without requiring that, then it was in good condition; but if it was not, then it did not comply with the statute, and the defendant was negligent.

If you fail to find from a preponderance of the evidence that the coupler was in bad condition, was not in such a condition that it could be operated reasonably from the outside, without requiring a man to go in between the ends of the cars, why, then, of course, that will end the case, because the defendant will not have been convicted of any negligence.

But if you find from a preponderance of the evidence that the coupler was in such a condition that it could not be reasonably operated from the outside and without requiring Poppler to go in between the cars, why, then you will be confronted by another question, which is also a question of negligence, and that is whether or not the deceased himself was guilty of any negligence which contributed to any degree to bring about this accident and cause his death. Mr. Poppler being dead, the presumption is that he

92 exercised due care for his own protection, but that presumption is not conclusive and may be rebutted by evidence. It stands, however, until overcome by evidence to the contrary. On this issue the burden is upon the defendant to show by a preponderance of evidence that Mr. Poppler was guilty of contributory negligence. Now, whether or not he was guilty of any negligence which contributed to cause his death depends upon whether or not he used due care for his own protection under the circumstances. He was not bound to use the highest degree of care for his own protection; he was not bound to absolutely protect himself at all events, nor to use the very highest degree of care that a man can use for his own protection, but he was bound to the use of reasonable care, such care as an ordinarily prudent person would have used under the same or similar circumstances, care commensurate with the circum-

stances, and such care as the situation and the circumstances then reasonably demanded; he was bound to the use of such care. And if he failed in any respect to use this care, this reasonable care, this ordinary care, and such failure in any degree contributed to bring about his death, then, of course, there can be no recovery, because he will have been guilty of contributory negligence, which is an absolute defense. In considering this question you are to take into consideration all the circumstances showing just exactly what the situation was, the business in which he was engaged, the business of railroading, railroad brakemen, the rate of speed at which this train was proceeding, the feasibility of doing the work in which he was then engaged in some other manner; and you are also to take into consideration this Rule No. 42 that has been offered in evidence.

93 There is some evidence tending to show that he knew of this rule. The evidence shows that it was issued some two years or something like that——

Mr. MUNN: A year and three months.

The COURT: A year and three months prior to this time, and there has been a paper introduced in evidence which bears his signature, and which his father says he thinks was his signature, and which tends to show that he received that circular and tends to show that he knew of the existence of this rule. Now, if he did know of it, or, under the circumstances, ought to have known of the rule, he was bound to obey it, and his violation of the rule would preclude any recovery unless the situation was such as to reasonably require him under the circumstances to violate the rule. It is one of the elements of evidence to take into consideration in connection with this question as to whether or not he exercised reasonable care for his own protection.

If you find from a preponderance of the evidence that he failed to exercise this reasonable care for his own protection, that the going in between there under the circumstances in which he went, with what other facilities have been shown to do the work, in violation of this rule—I say if you find from all the evidence pertaining to this question that he failed to exercise reasonable care for his own protection, why, then that ends the case, as I have said. But if you find that he was not guilty of a failure to exercise reasonable care, then you will be obliged to go forward and find a verdict in favor of the plaintiff and assess his damages.

Now, the damages in this case are more limited and a little different than they are in other personal injury cases. There can be no damages awarded for any pain or suffering or for anything that

94 happened to Richard S. Poppler himself personally, nor can there be any damages awarded to the plaintiff as the father, or to the mother, for mental anguish or any grief they might experience on account of having lost their son. The action is provided by the statute for the benefit of the next of kin, and in this case it happens that his next of kin was his father and mother, and their damages are exclusively of a pecuniary nature and they can only recover the amount of the pecuniary or financial loss which they have sustained by reason of the death of their son. In passing

upon this question you are to take into consideration the age and condition of the deceased, the amount of money he had been in the habit of contributing to his father and mother, the reasonable probability of a continuance of this in the future, taking into consideration that he was a young man just coming to be twenty-one years of age, what naturally and probably would happen to the young man had he continued to live in the future as affecting his ability to contribute to his father; also the age and condition of the father and mother; taking all these things into consideration you are to say what sum of money would fairly and reasonably compensate them for the actual cash loss they have sustained by reason of the death of the son Richard S. Poppler.

Now, gentlemen, you are the judges of all the evidence in this case, all the facts which have been shown in the evidence and all the conclusions proper to be drawn from the evidence; you are also the judges of the credibility of the witnesses. And in passing upon their credibility you are entitled to take into consideration their interest in the case, if any has appeared, their connection with the parties to the suit, their manner and demeanor upon the witness-stand, their frankness or lack of frankness, as the case may be.

95 To recapitulate a little bit, if you find that the plaintiff has not shown by a preponderance of the evidence that this car coupler was in such a condition that it could not be reasonably operated without the necessity of Mr. Poppler going between the ends of the cars, you will have to find a verdict for the defendant. But if you find that it was in such a condition that it could not be reasonably operated without the necessity of his going between the cars, you will then proceed to examine the second question, of contributory negligence. Even if you find that the coupler was in this defective condition, but further find that Richard S. Poppler was guilty of some failure to use reasonable care for his own protection under the circumstances, then you will also find a verdict for the defendant. But if you find that the coupler was in this defective condition and Poppler was not guilty of any contributory negligence, that he did not fail to use reasonable care for his own protection under the circumstances, then you will be obliged to find a verdict for the plaintiff and assess his damages according to the rule that I have laid down, that is, give him such a sum of money as will fairly and reasonably compensate the father and mother for the financial loss they have sustained by reason of the death of Richard S. Poppler.

If you find a verdict for the defendant, your verdict will be, "We, the jury find a verdict for the defendant." But if you find a verdict for the plaintiff, your verdict will be, "We the jury, find a verdict for the plaintiff and assess his damages at" such and such a sum, as you may arrive at under the instructions I have given you.

Any suggestions?

Mr. ANDERSON: I have none.

96 Mr. MUNN: I think your Honor did not point out the specific ground they have alleged as being defective so far as

this coupler is concerned. I don't know as that is necessary or not. They do allege this specific ground.

The COURT: Of course, there has been no evidence tending to show anything that was specifically wrong excepting the little evidence tending to show that it was stiff, and a little evidence of Kornell tending to show that when he tried to operate it the pin would not come up. But the question for you to decide, gentlemen, is whether or not that coupler was in such a condition that it could be reasonably operated from the outside without necessitating Poppler going in between the ends of the cars. Now, that is the test. If it could not be operated without necessitating a man going in between the ends of the cars, then they failed to comply with the statute, and if it could, it did not.

Mr. MUNN: The point I was making, your Honor, was, they allege in their pleadings just what the defect is.

The COURT: Yes, I know, but——

Mr. ANDERSON: It is immaterial whether we guessed right or not.

The COURT: I don't think it is necessary for them to lay their finger right on the specific thing, so long as they show that it did not work as required to work by the statute.

You may take the case, gentlemen.

The jury then retired to deliberate, and later returned a verdict in favor of the plaintiff, assessing his damages at the sum of $2,850.

A stay of forty days was agreed upon.

97 DEF'T'S EX. 2.

THIEF RIVER FALLS STATION, 5/12, 1908.

J. R. Michaels, Superintendent, Thief River Falls, 3/3618.

General Superintendent's Circular No. 176, of April 30, 1908, relative to going between moving cars and engines, received this date and instructions will be complied with.

(Sgd.) RICHARD POPPLER,
B'k'm.,
Occupation.

——— ———,
Witness.

This receipt to be returned to your Superintendent.

(On the back is stamped the following: "M. St. P. & S. S. M. Ry. Received June 9, 1908. General Superintendent.")

DEF'T'S EX. 3.

Soo Line.

Minneapolis, St. Paul and Sault Ste. Marie Ry., Office of General Superintendent.

Circular No. 176.

MINNEAPOLIS, April 30, 1908.

Conductors, Brakermen, Switchmen, and All Concerned:—

Your attention is called to Rule 42 for the Operating Department. Under no circumstances will you go between moving cars or engines to open or adjust couplings, or for any other purpose.

G. R. HUNTINGTON,
General Superintendent.

98 STATE OF MINNESOTA,
County of Ramsey:

District Court, 2nd Judicial District.

MICHAEL A. POPPLAR, as Administrator of the Estate of Richard S. Popplar, Deceased, Plaintiff,

vs.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, Defendant.

Notice of Proposed Case.

To Samuel A. Anderson, Esq., attorney for the above named plaintiff.

SIR: Please take notice that the defendant above named, the Minneapolis, St. Paul & Sault Ste. Marie Railway Company, a corporation, hereby proposes the foregoing record of testimony and proceedings as and for the settled case in the above entitled action upon which, together with other records, files and papers in said action, it will base its motion for judgment notwithstanding the verdict, and for a new trial; and you are hereby notified to, within the time allowed by law, offer such amendments thereto as you may deem proper.

Dated at St. Paul, Minn., this 11th day of March, A. D. 1912.

J. L. ERDALL,
M. D. MUNN,
Attorneys for Defendant.

1501-2 1520 Pioneer Bldg., St. Paul, Minn.

STATE OF MINNESOTA,
County of Ramsey:

District Court, 2nd Judicial District.

MICHAEL A. POPPLAR, as Administrator of the Estate of Richard S. Popplar, Deceased, Plaintiff,

vs.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, Defendant.

Stipulation Settling Case.

It is hereby stipulated and agreed by and between the parties to the above entitled action that the foregoing and attached proposed case contains all the testimony introduced and offered at the trial of the action above entitled by the respective parties thereto, together with all the objections to such testimony by the respective parties, and the rulings of the Court thereon and the exceptions of the respective parties to such rulings; also the charge of the Court
99 to the jury and the exceptions of the respective parties thereto; and all other proceedings had in connection with the trial of said action; and the same may be allowed as and for the settled case in said action.

S. A. ANDERSON,
Att'y for Plaintiff.
M. D. MUNN,
Att'y for Defendant.

STATE OF MINNESOTA,
County of Ramsey:

District Court, 2nd Judicial District.

MICHAEL A. POPPLAR, as Administrator of the Estate of Richard S. Popplar, Deceased, Plaintiff,

vs.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, Defendant.

Order Settling Case.

I hereby certify that the foregoing and attached proposed case contains all the evidence introduced and offered by the respective parties to the action above entitled; all objections, rulings and exceptions in connection with the introduction of such testimony; the charge of the Court and all exceptions thereto by the respective counsel, and all other proceedings had on the trial of said action.

I hereby settle and allow the same as and for the settled case herein.

Dated this 12th day of September, 1912.

FREDERICK N. DICKSON,
District Judge.

Endorsed: Filed September 19, 1912. Matt Jensen, Clerk, by G. P. Ritt, Deputy.

100 STATE OF MINNESOTA,
County of Ramsey:

District Court, Second Judicial District.

MICHAEL A. POPPLER, Admr., etc., Plaintiff,
vs.
MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, Defendant.

Now comes the defendant in the above entitled action, and moves the Court to set aside the verdict, and enter Judgment in favor of the defendant, notwithstanding the verdict, on the following grounds:

I.

That the plaintiff had failed to establish any cause of action, under the pleadings;

II.

That the testimony in said action fails to establish any negligence on the part of the defendant, which was either the approximate cause of, or responsible for the injuries complained of, which resulted in the death of plaintiff's deceased;

III.

Upon the ground that the testimony shows such negligence on the part of plaintiff's deceased, contributing to or causing the injuries complained of, which resulted in the death of plaintiff's deceased, as to preclude a recovery.

If said Motion is denied, then the defendant in the above entitled action moves that the court grant a new trial thereof, on the following grounds:

I.

101 On the ground that the damages given by the Jury are excessive and not justified by the evidence, and appear to be given under the influence of passion or prejudice.

II.

On the ground of errors of law, occurring at the trial and duly excepted to by the defendant.

III.

That the verdict is not justified by the evidence and is contrary to law.

Said Motion for Judgment and in case of its denial, the Motion for a new trial will be based on the settled case in said action, the pleadings, records and files in said cause.

Dated this 17th day of June, 1912.

J. L. ERDALL,
M. D. MUNN,
Attorneys for Defendant,
1501-2, 1520 *Pioneer Bldg., St. Paul, Minn.*

Endorsed: Filed Sept. 19, 1912. Matt Jensen, Clerk. By G. P. Ritt, Deputy.

102 STATE OF MINNESOTA,
County of Ramsey:

District Court, Second Judicial District.

MICHAEL A. POPPLER, Administrator, etc., Plaintiff,
vs.
THE MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, Defendant.

The above entitled action came before the Court, sitting in chambers, on the 12th day of September, 1912, upon motion of the defendant for an order directing judgment in its favor notwithstanding the verdict, upon the following grounds: First, that plaintiff failed to establish any cause of action under the pleadings; second, that the testimony in the action fails to establish any negligence on the part of the defendant which was either the proximate cause of or responsible for the injuries complained of; and, third, that the testimony conclusively shows negligence on the part of the plaintiff's intestate proximately contributing to his injuries. Defendant also moved that in case said motion be denied, the Court grant a new trial of said action, upon the grounds; first, that the damages given by the jury are excessive and not justified by the evidence and appear to have been given under the influence of passion and prejudice; second, errors of law occurring at the trial and duly excepted to by the defendant; and, third, that the verdict is not justified by the evidence and contrary to law.

Mr. M. D. Munn appeared for the defendant and Mr. Samuel A. Anderson appeared for the plaintiff.

After hearing counsel and upon consideration, it is ordered, that both said motions be and they are hereby in all things
103 denied.

FREDERICK N. DICKSON,
District Judge.

Dated September 19, 1912.

Memorandum.

On this motion defendant claims that it is obvious from the record that plaintiff's intestate, upon discovering the inefficiency of the automatic coupler on the car which in the position he then occupied he was compelled to use in order to make the uncoupling, might have signaled the engineer to stop and gone around the lead car and used the coupler on the lead car on the opposite side of the train, and that because he failed to do this he was guilty of contributory negligence as a matter of law.

He relies on the doctrine of the federal courts that when there is a comparatively safe and a more dangerous way known to a servant by means of which he may discharge his duty, it is negligence for him to select the more dangerous method and he thereby assumes the risk of the injury which its use entails.

Morris v. Duluth, South Shore & Atlantic Ry. Co., 108 Fed. Rep., 749.

It seems to me that this rule is vicious in that in its ultimate logical analysis it imposes upon an employe the duty to exercise for his own protection the highest degree of care possible under the circumstances of each case, whereas the law of Minnesota only requires the use of ordinary care, such case as a person of ordinary prudence would use under the same or similar circumstances.

Defendant's counsel also urges that it was negligence as a
104 matter of law for the plaintiff's intestate to go between the cars in violation of the company's rule (which he had agreed to observe), which reads as follows: "Under no circumstances will you go between moving cars or engines to open or adjust couplings, or for any other purpose."

This rule is, of course, binding where the equipment furnished is sufficient to obviate the necessity of going between the cars.

But where, through the defendant's negligence, in the midst of a switching operation such equipment fails, an emergency thereby arises calling for quick action and speedy exercise of judgment, and I don't think it is negligence per se under such circumstances for an employe to elect to finish the work in hand in the way it had to be done in the days when no such automatic equipment was used or required.

Where under circumstances such as are shown in this case a brakeman in the midst of an operation is confronted with any unforeseen emergency created by an inefficient coupler, and under such circumstances disregards the rule, it is, in my judgment, for the jury to say whether such disobedience was a failure to use ordinary care or was reasonably required by the circumstances.

DICKSON, *J.*

Endorsed: Filed September 19, 1912. Matt Jensen, Clerk. By G. P. Ritt, Deputy.

105 STATE OF MINNESOTA,
County of Ramsey:

District Court, 2nd Judicial District.

MICHAEL A. POPPLAR, as Administrator of the Estate of Richard Popplar, Deceased, Plaintiff,
vs.
MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, Defendant.

To Samuel A. Anderson, Attorney for the Above Named Plaintiff, and to Matt Jensen, Clerk of the Above Named Court.

GENTLEMEN: Please take notice that the defendant above named appeals from the order of the Court made and entered in the above entitled action upon the 19th day of September, 1912, whereby the Court denied the defendant's motion for judgment notwithstanding the verdict and defendant's motion for a new trial, and from the whole of said order.

Dated September 19, 1912.

JOHN L. ERDALL & M. D. MUNN,
Attorneys for Defendant.

Bond on appeal is hereby waived.

SAMUEL A. ANDERSON,
Respondent's Attorney.

Endorsed: Filed September 20, 1912. Matt Jensen, Clerk. By G. P. Ritt, Deputy.

106 Second Judicial District.

STATE OF MINNESOTA,
County of Ramsey:

I, Matt Jensen, Clerk of the District Court, Ramsey County and State of Minnesota, do hereby certify and return to the Honorable the Supreme Court of said State, that I have compared the foregoing paper writing with the original Summons & Complaint, Answer, Reply, Settled Case, Notice of Motion, Order Denying Motion, Notice of Appeal, in the action therein entitled, now remaining of record in my office, and that the same is a true and correct copy and transcript of said original and the whole thereof.

Witness my hand and seal of said Court, at St. Paul, this 20th day of September, A. D. 1912.

[Seal of the District Court of Ramsey County, Minn.]

(Signed) MATT JENSEN, *Clerk.*
By G. P. RITT, *Deputy.*

107 District Court, Ramsey County.

17918.

MICHAEL POPPLAR, Plaintiff,
vs.
M'P'LIS, ST. PAUL & S. STE M. RY. CO., Defendant.

Return to Supreme Court.

M. D. Munn, Attorney for Defendant.

Filed Sept. 20, 1912.
I. A. CASWELL, *Clerk.*

108 STATE OF MINNESOTA:

17918.

Supreme Court, April Term, 1913.

MICHAEL POPPLAR, as Administrator of the Estate of Richard S. Popplar, Deceased, Respondent,
vs.
MINNEAPOLIS, ST. PAUL & SAULT STE MARIE RAILWAY COMPANY, Appellant.

Assignments of Error.

J. L. Erdall, M. D. Munn, Attorneys for Appellant.

Filed April 18, 1913.
I. A. CASWELL, *Clerk.*

109 STATE OF MINNESOTA:

Supreme Court, April Term, 1913.

MICHAEL A. POPPLAR, as Administrator of the Estate of Richard S. Popplar, Deceased, Respondent,
vs.
MINNEAPOLIS, ST. PAUL & SAULT STE MARIE RAILWAY COMPANY, Appellant.

Assignments of Error.

The Court erred in denying appellant's motion for a directed verdict at the close of the testimony, on the ground that the plaintiff had failed to prove or establish any cause of action under the pleadings.

II.

The Court erred in denying appellant's motion for a directed verdict at the close of the testimony on the ground that the testimony fails to establish any negligence on the part of the defendant, causing the injuries complained of.

III.

The Court erred in denying appellant's motion for a directed verdict on the ground that the testimony shows such negligence on the part of the plaintiff's deceased, contributing to or causing the injuries which resulted in his death, as to preclude a recovery.

IV.

The Court erred in denying appellant's motion for judgment notwithstanding the verdict, upon the ground that the plaintiff failed to establish any cause of action, under the pleadings.

110

V.

The Court erred in denying appellant's motion for judgment notwithstanding the verdict on the ground that the testimony fails to establish any negligence on the part of the defendant, which is either the proximate cause of or responsible for the injuries complained of, resulting in the death of plaintiff's deceased.

VI.

The Court erred in denying appellant's motion for judgment notwithstanding the verdict on the ground that the testimony shows such negligence on the part of plaintiff's deceased, contributing to or causing the injuries complained of, which resulted in the death of the plaintiff's deceased, as to preclude a recovery.

VII.

The Court erred in denying appellant's motion for a new trial on the ground that the verdict is not justified by the evidence and is contrary to law.

VIII.

The Court erred in denying appellant's motion for a new trial on the ground that the damages given by the jury are excessive and not justified by the evidence, and appear to be given under the influence of passion and prejudice.

J. L. ERDALL,
M. D. MUNN,
For Appellant.

111 STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1913.

17918.

MICHAEL POPPLAR, Adm'r, Respondent,
vs.
M., ST. P. & S. S. M. RY. CO., Appellant.

Opinion and Syllabus.

Filed May 23, 1913.
I. A. CASWELL, *Clerk.*

Hallam, J.

112 17918.

STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1913.

No. 72.

MICHAEL A. POPPLAR, Adm'r, Respondent,
v.
M., ST. P. & S. S. M. RY. CO., Appellant.

Syllabus.

1. The federal safety appli*ance* act imposes an absolute duty upon a railroad, on a highway of interstate commerce, to have couplers in such condition at all times, that, when operated in an ordinary and reasonable manner, the cars can be uncoupled without requiring the operator to go between the cars. In this case the operator in attempting to lift the pin to open a coupler, "jerked on it and pulled up at it", three or four times but it would not uncouple. Another brakeman testified that he soon thereafter tried to lift the pin but could not. Defendant's witnesses admitted that it worked stiff. This was sufficient evidence to sustain a finding of the jury that the coupler was not such as was required by law.

2. Where in switching operations in a large railroad yard a car is being "kicked" and the usual method of uncoupling is to pull the pin while the cars are in motion, if the pin lifter on an automatic coupler refuses to work, the act of the brakeman in going between the cars while in motion to make the uncoupling is not conclusive of negligence on his part, where the only way to open the
113 coupler without so doing is to stop the train, abandon the "kick" and walk around to a lever on the other side of the train.

3. The violation by an employe of a rule of the employer made for the protection of employes, is ordinarily held to constitute negligence per se. But this doctrine is not an absolute one. It yields to practical necessity. If the employer has failed to comply with some requirement of law and such failure makes it impossible for the employe to do his work in the usual way, this may excuse him if he follows a method of doing the work which is the only method reasonably practicable under the circumstances or is a method which a reasonably prudent man would follow.

4. In this case a rule of defendant forbade brakemen going in between moving cars. The rule must be construed in connection with the statute. The course to be followed by a brakeman when an automatic coupler refuses to work is not pointed out in any rule. The only way to uncouple without going between cars was to stop the train and walk around to the other side. The conductor on the train, called by defendant, testified that it was not necessary for the brakeman to do this but that he might go between the cars while standing and open the coupler. This was one of the things the statute was designed to avoid. Under all the circumstances of the case, the question whether disobedience of the rule was in this case negligence, was one of fact for the jury.

Order affirmed.

114 17918.

STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1913.

No. 72.

MICHAEL A. POPPLAR, Adm'r, Respondent,

v.

M., ST. P. & S. S. M. RY. CO., Appellant.

Opinion.

Richard Popplar was a rear brakeman in a train crew of defendant. On the morning of September 6, 1909, he was engaged with his crew in defendant's railway yard at Mahnomen, Minnesota, in making up a train. It is admitted that defendant's road at this point is a highway of interstate commerce, but there is no evidence that Popplar was at the time employed in interstate traffic. At the time in question the train crew was engaged in "kicking" a car on to a side track. The car to be "kicked" was at the rear end of a short string of cars attached to the engine. The train was backed on to the side track; when it arrived at such point that the car to be "kicked" would of its own momentum run to the desired place. Popplar was to give a stop signal to the head brakeman, who was to transmit it to the engineer, and the engineer was to stop the engine. As the train slowed down, the slack would run out of the couplings and it

would then be impossible to uncouple this car. It was, accordingly, part of the process of "kicking" that Popplar make the un-
115 coupling before the engine slackened speed. This he undertook to do. Both cars were equipped with automatic couplers. At each coupling there were two pins, one on each car. The pulling of either would uncouple the cars. Each car was equipped with a pin lifter at each coupling; as the cars stood end to end the pin lifters were on opposite sides, and they were so designed that, when in order, the brakemen could uncouple from either side without going between the cars. Popplar moved along on the ground beside the cars. At the proper time he gave the stop signal and then immediately undertook to lift the coupling pin operated by the lever on his side. He did not succeed in doing so. He then stepped between the cars and with his hand pulled the other pin which was operated by the lever on the opposite side. While doing so he was run over and killed. The train was running about four miles an hour.

Plaintiff charges liability on the ground that Popplar's death was caused by the failure of defendant to have this car equipped with couplers which could be uncoupled without the necessity of men going between the ends of the cars, as required by the Federal Safety Appliance Act. Defendant denies this charge and further contends that deceased was guilty of contributory negligence that bars recovery. The court submitted both issues to the jury. The jury found for plaintiff. Defendant moved in the alternative for judgment notwithstanding the verdict or for a new trial. Both motions were denied and defendant appeals.

1. The evidence is sufficient to sustain the finding that this coupling did not comply with the Federal Safety Appliance Act.
116 This court has held, following the decisions of the Supreme Court of the United States, that this statute imposes an absolute duty upon a railroad, on a highway of interstate commerce, to have couplers in such condition at all times, that, when operated in an ordinary and reasonable manner, the cars can be uncoupled without requiring the operator to go between the cars. Burhe v. M. & St. L. Ry. Co., 141 N. W., — (Minn.), and cases there cited. The only eye witness to this accident testified that Popplar tried three or four times to pull this pin with the lifter, that he "jerked on it and pulled up at it" but it would not uncouple. The same witness testified that after the accident he himself tried to lift the pin on this car and couldn't do it, that it came up half way and blocked. One of the defendant's witnesses, the conductor, testified that this pin could be worked but that it "worked stiff", and that he would have reported it as "a bad coupler" had it come to his attention. The jury might fairly find from this evidence that the coupler was not such as was required by law.

2. Defendant contends that the evidence is conclusive that Popplar was guilty of contributory negligence. The Safety Appliance Act permits the defense of contributory negligence. The Employers' Liability Act of 1908 amends the Safety Appliance Act so as to abolish this defense when the employe is engaged in interstate com-

merce; but this is not such a case. We must accordingly determine whether contributory negligence was conclusively established. In our judgment it was not. Defendant's contention is this, that the pin which was operated by the lever on the opposite side of
117 the cars was in proper condition; that Popplar could have made the uncoupling with safety by the use of that lever, and that under the circumstances it was contributory negligence as a matter of law to go between the cars while in motion. A rule laid down in some of the federal courts is invoked, to-wit: that the act of Congress contemplates that brakemen should not go between cars, and that where two ways are open to an employe to perform a certain act, one safe, the other unsafe, and the employe adopts the unsafe method, he cannot recover. This rule has been applied to cases similar to this and recovery denied. Perhaps the leading case of this sort is Gilbert v. Burlington C. R. & N. Ry. Co. (C. C. A., 8th Circuit) 128 Fed. 529. Within certain limitations the rule is doubtless sound, that where a safe and an unsafe way are open to an employe, he is obliged to choose the safe way. The application of that doctrine made in the Gilbert case is, however, distinctly disapproved by the United States Circuit Court of Appeals for the 7th circuit in the later case of Chicago R. I. & Pac. Ry. Co. v. Brown, 185 Fed. 81; and this case was followed and applied in Grand Trunk Western Ry. Co. v. Lindsay, 201 Fed. 836.

The Brown case in its facts is much like the case at bar. Brown was a switchman in a large switch yard. He was called upon at night to uncouple some cars. Not being in touch by signal with the engineer, he conveyed his signals to another switchman who conveyed them to the engineer. The uncoupling was to be done while shoving the cars. Both cars were equipped with safety appliances but the safety appliance on the side of the car on which he was working at the time would not operate. He gave three or four jerks at it which failed to open the coupler. He then reached in be-
118 tween the cars and tried to lift the pin with his hand, but could not. He then tried to reach the pin operated by the lever from the other side. While doing so he fell and was injured. Had he abandoned the uncoupling until the cars came to a standstill, he would have been saved from the accident. The circuit court instructed the jury as a matter of law that, under the safety appliance act, Brown was not chargeable with contributory negligence by the mere fact of going in between the cars to effect the uncoupling, but that he was required to exercise ordinary care for his own safety after he went between the cars and while there endeavoring to effect an uncoupling. This instruction was sustained. Grosscup, J. said, "To our minds, the act was intended, not to increase the difficulty of getting compensation for injuries sustained, but to decrease the number of cases in which injuries would happen. It abolishes, in terms, assumption of risk. And where there exists a practical necessity, such as confronted this switchman, to uncouple the cars by some means other than the defective lever, what is done is assumption of risk. Putting his arm between the cars, under such circumstances, and traveling with them, is not per se contributory

negligence." The only substantial difference between the Brown case and the case at bar is that in that case the car to be uncoupled was about midway of a string of eight cars while here it was on the end.

In this case it appears that the yards at Mahnomen were large yards. There is no evidence as to the extent of switching
119 operations going on at this time. One witness for defendant, when asked as to the number of cars in the yard, could not say whether there were ten or one hundred. The conductor testified that this train was about on time and that he had given no orders to anybody for special hurry, but he further testified that the operation of "kicking" cars is a quick operation and that when the men are doing switching they are working rapidly. The very purpose of "kicking" instead of shoving a car to its place is to save time. The only way for Popplar to make this uncoupling without going between the cars was to signal the head brakeman to signal the engineer to stop the train, then walk around it and pull the pin lifter on the opposite side. This would be an abandonment of this particular "kicking" operation. This court cannot say as a matter of law that, under all the circumstances of this case, such a course would have constituted practical railroading. No witness so testified. In fact the conductor, a witness for defendant, makes it clear that this was not considered necessary. It was urged in the Brown case that this was the brakeman's duty under such circumstances. As to this the court said, "There is nothing in the facts before us that shows that defendant in error might, without violating his duty or doing injury to the road, have stopped the operation of the train until he could have gone around on the other side." The question whether it was negligence for Popplar to go between the cars under the circumstances here presented, was a question for the jury.

3. It is also urged that recovery must be denied because deceased at the time of the accident was violating a rule of the com-
120 pany. It appears that in April, 1908, defendant promulgated a rule for brakemen and others, which read, "Under no circumstances will you go between moving cars or engines to open or adjust couplings, or for any other purpose." On May 12, 1908, Popplar signed a receipt for this circular, which read, "General Superintendent's circular No. 176 of April 30, 1908, relative to going between moving cars and engines, received this date and instructions will be complied with." Popplar did violate this rule when he went between these moving cars. It is contended that this is negligence per se. Ordinarily the violation by an employe of a rule of the employer made for the protection of employes constitutes negligence per se. But this doctrine is not an absolute one. It yields to practical necessity. Green v. Brainerd & Northern Minn., Ry. Co., 85 Minn., 322; Pounds v. C. G. W. Ry. Co., 114 Minn., 312. If the employer has himself failed to comply with some requirement of law and such failure makes it impossible for the employe to do his work in the usual way, this may excuse him in the violation of such a rule. It does excuse him if he follows a method of doing the work which is the only method reasonably practicable under the

circumstances, or which is a method which a reasonably prudent man would follow.

4. And the rule must be construed in connection with the safety appliance act. The course for an employe to pursue when a coupling pin does not operate as the law requires is nowhere pointed out in any rule. Does the rule contemplate that he should abandon the "kicking" operation, stop the train, and walk around to the pin lifter on the other side. The conductor, speaking as a practical
121 railroad man, said "that wouldn't be necessary; you could stop it right there and stand still, not necessarily go around," that is to say, you could go in between the cars while they were standing and pull the other pin. In this view defendant's counsel seem to concur. They argue that, "there was a perfectly safe way for Popplar to have performed the work—and observed the written instructions," namely, by stopping the train and then either going around to the other side or "by stepping in between the cars while they were standing still." But if the rule contemplates this method, it is clear that the statute does not. The necessity of going between the cars while standing is one of the things which, for obvious reasons, the statute was designed to avoid. That is precisely what the plaintiff in the Lindsay case, supra, did do. He received his injury in so doing, and it was urged there that his course was contributory negligence as a matter of law. We cannot, accordingly, hold, as a matter of law, that Popplar should have stopped the train and stepped between the cars. Nor can we hold that it conclusively appears that reasonable prudence required that he should have stopped the train and walked around to the other side, a course which his superior, the conductor of his train, declared not necessary. We hold that the jury might fairly find from all the evidence that a practical necessity exis-ed for the disobedience of this rule and that the course which Popplar followed in the emergency in which he was placed was the course of a reasonably prudent man.

Order affirmed.

HALLAM, *J.*

122 STATE OF MINNESOTA:

Supreme Court.

17918.

M. A. POPPLAR, as Adm'r, Respondent,

vs.

Soo RY. Co., Appellant.

Judgment Roll.

Filed June 4, 1913.

I. A. CASWELL, *Clerk.*

123 STATE OF MINNESOTA:

Supreme Court.

17918.

Copy of Order for Judgment.

Filed June 4, 1913.
I. A. CASWELL, *Clerk.*

124 STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1913.

No. 72.

MICHAEL A. POPPLAR, as Administrator of the Estate of Richard S. Popplar, Deceased, Respondent,

vs.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, Appellant.

Appeal from District Court, Second Judicial District, County of Ramsey.

This cause having been duly argued and submitted at the General April Term of this court A. D. 1913 upon the return to the appeal herein.

Now, after full and mature deliberation had thereon, it is here and hereby ordered that the order of the Court below, herein appealed from, be and the same hereby is, in all things affirmed, and that judgment be entered accordingly.

Entered June 4 A. D. 1913.

BY THE COURT.

Attest:
I. A. CASWELL, *Clerk.*

I hereby certify that the foregoing is a full and true copy of the original Order for judgment entered in the above entitled cause.

Attest:
[SUPREME COURT SEAL.] I. A. CASWELL, *Clerk.*

125 STATE OF MINNESOTA:

Supreme Court.

17918.

Minutes of Argument.

Filed June 4, 1913.
I. A. CASWELL, *Clerk.*

126 STATE OF MINNESOTA:

Supreme Court, General April Term, A. D. 1913.

Thursday morning, 9:30 o'clock, April 24, A. D. 1913, Court convened pursuant to adjournment.

Reg. No. 17918. Cal. No. 72.

M. A. POPPLAR, as Adm'r, Respondent,
vs.
Soo RY. CO., Appellant.

This cause came on to be heard this day upon the return to the appeal herein.

Thereupon the same was argued by counsel, submitted to the court for decision and taken under advisement.

A true record.

Attest:
I. A. CASWELL, *Clerk.*

The foregoing is a full and true copy of the Minutes of Argument in the above entitled cause.

Attest:
[SUPREME COURT SEAL.] I. A. CASWELL, *Clerk,*
By —— ——, *Deputy.*

127 STATE OF MINNESOTA,
Supreme Court, ss:

I, I. A. Caswell, Clerk of said Supreme Court, do hereby certify that the foregoing is a full and true copy of the Entry of Judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original and that the same is a correct transcript therefrom.

Witness my hand and the seal of said Supreme Court at the Capitol, in the City of St. Paul, June 4, 1913.

[Seal of the Supreme Court of the State of Minnesota.]

I. A. CASWELL, *Clerk.*

STATE OF MINNESOTA:

Supreme Court.

Transcript of Judgment.

Filed June 4, A. D. 1913.
I. A. CASWELL, *Clerk.*

128 STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1913.

No. 72.

MICHAEL POPPLAR, as Administrator of the Estate of Richard S. Popplar, Deceased, Respondent,
vs.
MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, Appellant.

Pursuant to an order of Court duly made and entered in this cause June 4 A. D. 1913, It is here and hereby determined and adjudged that the order of the Court below, herein appealed from, to-wit, of the District Court of the Second Judicial District, sitting within and for the County of Ramsey be and the same hereby is in all things affirmed. And it is further determined and adjudged that the Respondent above named, do have and recover of said Appellant herein the sum and amount of Forty-two and 50/100 dollars ($42.50) costs and disbursements in this cause in this Court, and that execution may be issued for the enforcement thereof.

Dated and signed June 4 A. D. 1913.

BY THE COURT.

Attest:
I. A. CASWELL, *Clerk.*

Statement for Judgment.

Cost allowed by statute	$25.00
Printer's fees	6.50
Clerk's fees, Supreme Court	11.00
Affidavits and Acknowledgments	.....
Return	.....
Postage and express	.....
Filing Mandate	.....
	$42.50

129 17918.

M. A. POPPLAR, Adm'r, Respondent,
VS.
"Soo" RY. CO., Appellant.

Judgment Roll.

Filed June 23, 1913.
I. A. CASWELL, *Clerk.*

130 District Court, Ramsey County.

17918.

MICHAEL POPPLAR, as Administrator of the Estate of Richard S. Popplar, Deceased, Plaintiff,
VS.
MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, Defendant.

Return to Supreme Court.

J. L. Erdall and M. D. Munn, Attorneys for Defendant.
S. A. Anderson, Attorney for Plaintiff.

Filed June 23, 1913.
I. A. CASWELL, *Clerk.*

131 STATE OF MINNESOTA,
County of Ramsey:

District Court, Second Judicial District.

MICHAEL A. POPPLAR, as Administrator of the Estate of Richard D. Popplar, Deceased, Plaintiff,
VS.
MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, Defendant.

Pursuant to the verdict of the jury duly rendered and filed in the above entitled action, on the 7th day of February, A. D. 1912,

Now, on motion of Samuel A. Anderson, Esq., said Attorney, it is hereby adjudged that the plaintiff herein recover of said Defendant Minneapolis, St. Paul & Sault Ste. Marie Railway Company, the sum of Three Thousand Seventy-Eight Dollars damages, with Twenty-Seven and 09/100 Dollars costs and disbursements, in all amounting to $3,105.09.

Signed this 6th day of June, A. D. 1913.

[Seal District Court, Ramsey County, Minn.]

MATT JENSEN, *Clerk,*
By G. A. JOHNSON,
Deputy Clerk.

132 District Court, Ramsey County.

106,595.

MICHAEL A. POPPLAR, Plaintiff,
vs.
M., ST. P. & S. STE. M. RY. CO., Defendant.

Judgment Roll.

Filed 6th day of June, A. D. 1913.
MATT JENSEN, *Clerk,*
By G. A. JOHNSON,
Deputy Clerk.

S. A. ANDERSON,
Plaintiff's Attorney.

133 STATE OF MINNESOTA,
County of Ramsey:

District Court, Second Judicial District.

MICHAEL A. POPPLAR, as Administrator of the Estate of Richard D. Popplar, Deceased, Plaintiff,
vs.
MINNEAPOLIS, ST. PAUL AND SAULT STE. MARIE RAILWAY COMPANY, Defendant.

Notice of Appeal from Judgment.

To Samuel A. Anderson, attorney for the above named plaintiff, and to Matt Jensen, clerk of the above named court.

GENTLEMEN: Please take notice that the defendant above named appeals from the judgment of this Court entered of record in the office of the Clerk of said Court on the 6th day of June A. D. 1913, in favor of the Plaintiff herein and against defendant herein, for the sum of Three thousand one hundred forty-five and 99/100 ($3,145.99) Dollars and from the whole of the record in said cause.

J. L. ERDALL AND
M. D. MUNN,
Attorneys for said Defendant.

Dated June 23, 1913.

Bond of Appeal to the Supreme Court is hereby waived.

SAMUEL A. ANDERSON,
Attorney for Respondent.

Due and personal notice of the within notice of appeal is hereby admitted this 23rd day of June, 1913.

SAMUEL A. ANDERSON,
Attorney for Plaintiff Respondent.
MATT JENSEN,
Clerk District Court.

Filed June 23, 1913.
MATT JENSEN, *Clerk.*

134 STATE OF MINNESOTA,
County of Ramsey, ss:

Second Judicial District.

I, Matt Jensen, Clerk of the District Court, Ramsey County, and State of Minnesota, do hereby certify and return to the Honorable the Supreme Court of said State, that I have compared the foregoing paper writing with the original notice of appeal from the judgment and judgment in the action therein entitled, now remaining of record in my office, and that the same is a true and correct copy and transcript of said original and the whole thereof.

Witness my hand and seal of said Court, at St. Paul, this 23rd day of June A D. 1913.

[SEAL.]

MATT JENSEN, *Clerk,*
By G. P. RITT,
Deputy Clerk.

135 In the Supreme Court, State of Minnesota.

17918.

MICHAEL A. POPPLAR, as Adm'r of the Estate of Richard D. Popplar, Deceased,
vs.
MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY.

Order Affirming Judgment.

Filed Jun- 23, 1913.
I. A. CASWELL, *Clerk.*

M. D. Munn, Att'y for Defendant, 1501-2 1520 Pioneer Bldg., St. Paul, Minn.

136 In the Supreme Court, State of Minnesota.

MICHAEL A. POPPLAR, as Administrator of the Estate of Richard D. Popplar, Deceased, Plaintiff-Respondent,

vs.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, Defendant-Appellant.

The above entitled action having been brought to this Court upon an appeal from the judgment heretofore entered in the District Court in and for Ramsey County, Minnesota, on the 6th day of June, A. D. 1913, in favor of the Plaintiff-Respondent herein and against the Defendant-Appellant herein, for the sum of thirty-one hundred forty-five and 99/100 ($3,145.99) Dollars, and based upon the assignments of error as appear upon the record previously presented to this Court upon the former appeal from an order of said District Court denying its motion for judgment notwithstanding the verdict or for a new trial, and the said appeal from the judgment having been duly submitted to this Court without argument by the respective parties, after due consideration it is hereby ordered that the judgment appealed from is in all things affirmed.

Dated June 23, 1913.

(Signed) OSCAR HALLAM,
Associate Justice Supreme Court.

137 STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1913.

No. 72.

MICHAEL A. POPPLAR, as Administrator of the Estate of Richard D. Popplar, Deceased, Respondent,

vs.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, Appellant.

Pursuant to an order of Court duly made and entered in this cause June 23, A. D. 1913, it is here and hereby determined and adjudged that the judgment of the Court below, herein appealed from, to wit, of the District Court of the Second Judicial District, sitting within and for the County of Ramsey be and the same hereby is in all things affirmed.

Dated and signed June 23, A. D. 1913.

BY THE COURT.

Attest:

I. A. CASWELL, *Clerk.*

138 STATE OF MINNESOTA,
Supreme Court, ss:

I, I. A. Caswell, Clerk of said Supreme Court, do hereby certify that the foregoing is a full and true copy of the Entry of Judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original and that the same is a correct transcript therefrom.

Witness my hand and the seal of said Supreme Court at the Capitol in the City of St. Paul, June 23, A. D. 1913.

[Seal of the Supreme Court of the State of Minnesota.]

I. A. CASWELL, *Clerk.*

Transcript of Judgment.

Filed June 23, A. D. 1913.
I. A. CASWELL, *Clerk.*

139 STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1913.

No. 72.

MICHAEL A. POPPLAR, as Administrator of the Estate of Richard D. Popplar, Deceased, Respondent,

vs.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, Appellant.

Appeal from District Court, Second Judicial District, County of Ramsey.

This cause having been duly argued and submitted at the General April Term of this court A. D. 1913 upon the return to the appeal herein.

Now, after full and mature deliberation had therein, it is here and hereby ordered that the judgment of the Court below, herein appealed from, be and the same hereby is, in all things affirmed, and that judgment be entered accordingly.

Entered June 23, A. D. 1913.

BY THE COURT.

Attest:
I. A. CASWELL, *Clerk.*

I hereby certify that the foregoing is a full and true copy of the original Order for judgment entered in the above entitled cause.

[Seal Supreme Court, State of Minnesota.]

Attest:

I. A. CASWELL, *Clerk.*

140 17918.

STATE OF MINNESOTA,
Supreme Court:

Copy of Order for Judgment.

Filed June 23, A. D. 1913.
I. A. CASWELL, *Clerk.*

141 *Authentication of Record.*

STATE OF MINNESOTA,
Supreme Court, ss:

I, I. A. Caswell, Clerk of said Court, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of Michael A. Popplar, as administrator of the estate of Richard S. Popplar, deceased, Respondent, vs. Minneapolis, St. Paul & Sault Ste. Marie Railway Company, Appellant, and also of the opinion of the Court rendered therein, and of the Assignments of Error to the said Court, as the same now appear on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at my office, in St. Paul, Minnesota, this 25th day of June, A. D. 1913.

[Seal of the Supreme Court, State of Minnesota.]

I. A. CASWELL,
Clerk Supreme Court of Minnesota.

142 (Original.)

In the Supreme Court, State of Minnesota.

17918.

MICHAEL A. POPPLAR
vs.
MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY.

Bond.

Filed Jun- 24, 1913.
I. A. CASWELL, *Clerk.*

M. D. Munn, Att'y for Defendant and Appellant, 1501-2 Pioneer Bldg., St. Paul, Minnesota.

143 In Supreme Court, State of Minnesota.

MICHAEL A. POPPLAR, as Administrator, Plaintiff and Respondent,
vs.
MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY,
Defendant and Appellant.

Know all men by these presents, that we, the Minneapolis, St. Paul & Sault Ste. Marie Ry. Co. as principal, and the National Surety Company, as surety, are held and firmly bound unto the above named Michael A. Popplar, as administrator, in the sum of Four thousand (4,000) dollars to be paid to the said Michael A. Popplar as such administrator, for the payment of which, well and truly to be made, we bind ourselves, and each of us, jointly and severally by these presents, sealed with our seals and dated this 24th day of June A. D. 1913.

The condition of this obligation is such that

Whereas the above named Minneapolis, St. Paul & Sault Ste. Marie Railway Company has prosecuted an appeal to the supreme court of the United States, to reverse the decree and decision rendered in the above entitled cause, by the supreme court of the state of Minnesota,

Now therefore, if the above named Minneapolis, St. Paul & Sault Ste. Marie Railway Company shall prosecute said appeal to effect, and answer all damages and costs, if it shall fail to make said appeal
144 good, and shall pay any final judgment rendered in said action, then this obligation shall be void, otherwise the same shall be and remain in full force and effect.

In witness whereof the parties hereunto have set their hands and seals, the day and year above written.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY,
By M. D. MUNN, *Its Attorney.*
NATIONAL SURETY COMPANY,
By W. C. McCURDY,
[CORPORATE SEAL.] *Its Attorney-in-Fact.*

In presence of
E. O. WERGEDAHL.
EVAN CEDERLEAF.

STATE OF MINNESOTA,
County of Ramsey, ss:

Personally appeared before me, W. S. McCurdy, to me known to be the attorney-in-fact of the National Surety Company, surety above named, and duly acknowledged that he executed the foregoing instrument for the purpose therein stated, and that such execution was made by authority of the Board of Directors of the said National Surety Company, also personally appeared before me M. D.

Munn, who duly acknowledged that he is attorney for the above named Minneapolis, St. Paul & Sault Ste. Marie Railway Company, that he executed the foregoing bond, for and on behalf of the said company, and by authority of said last named company.

W. C. McCURDY.
M. D. MUNN.

Subscribed and sworn to before me this 24th day of June A. D. 1913.

EVAN CEDERLEAF, [SEAL.]
Notary Public, Ramsey County, Minn.

My Commission expires June 2nd 1920.

Approved:
CALVIN L. BROWN, *Chief Justice.*

145 17918.

(Original.)

In Surpreme Court, State of Minnesota.

MICHAEL A. POPPLAR, as Adm'r,
vs.
MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY.

Petition and Order.

Filed Jun- 24, 1913.
I. A. CASWELL, *Clerk.*

M. D. MUNN,
Attorney for Appellant,
1501-2 *Pioneer Bldg., St. Paul, Minn.*

146 In Supreme Court.

STATE OF MINNESOTA:

MICHAEL A. POPPLAR, as Adminstrator, Respondent,
vs.
MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY Co., Appellant.

Petition.

The petition of the Minneapolis, St. Paul & Sault Ste. Marie Railway Company, Appellant in the above entitled cause, respectfully shows to your Honor:

I.

That said cause is an action commenced by the respondent above named, against your petitioner, to recover for personal injuries claimed to have been sustained by respondent's deceased while attempting to uncouple a car in one of the yards of the above named appellant. That said cause was commenced in the District Court of Ramsey County, State of Minnesota, and after trial before jury, and on the 7th day of February, 1912, a verdict was returned against appellant and in favor of respondent, for the sum of Two thousand eight hundred fifty (2,850) Dollars.

II.

That thereafter a motion for judgment or a new trial was duly made. and on the 12th day of September, 1912, an order was made and filed in the District Court of Ramsey County, denying your petitioner's said motion for judgment, or a new trial. That there-
147 after an appeal was duly taken, to the Supreme Court of the State of Minnesota, from said order, which said last named court, on the 23rd day of May, 1913, rendered its decision in said cause, affirming the order made by the lower court, denying your petitioners' motion for judgment or a new trial, and directing the clerk of said District Court to enter judgment in favor of said respondent and against your petitioner, for the said sum of Two thousand eight hundred fifty (2,850) dollars, together with interest thereon from the 7th day of February, 1912, and the costs and disbursements of said action. That thereafter, and on the 6th day of June, 1913, final judgment was entered by the clerk of said District Court of Ramsey County, against your petitioner, for the sum of Three thousand one hundred forty-five and 99/100 (3,145.99) dollars, pursuant to the decision and direction of the Supreme Court of the State of Minnesota. That said judgment so entered by the said district court of Ramsey County is a final judgment between your petitioner and said respondent, and the judgment of the court of last resort in the state of Minnesota.

III.

That said respondent above named brought his said action to recover against your petitioner for the alleged violation of the federal safety appliance acts passed by the Congress of the United States, on the 2nd day of March, 1893, April 1st and March 2nd, 1903. That in said record it appears that respondent's deceased attempted to uncouple two cars, while carrying interstate commerce, and then being operated by your petitioner, by stepping in between the same,
while in motion. That such action on the part of respondent's
148 deceased, was in direct violation and contrary to the written rules and instructions of your petitioner given to said respondent's deceased. That it was claimed by said respondent that the coupling device on one of said cars was out of order, and that this was the reason and excuse for respondent's deceased stepping in between said cars. It is admitted in the record that such action on

the part of respondent's deceased was in direct violation of and contrary to the written rules and instructions of your petitioner, given to said respondent's deceased, and which said respondent's deceased had agreed to observe. That the sole questions involved in said action were:

First. Whether or not your petitioner had violated any of the terms and provisions of said federal safety appliance acts, and

Second. Whether or not respondent was entitled to recover under the admitted fact that respondent's deceased had stepped in between said moving cars in direct violation of and contrary to the written rules and instructions of your petitioner.

It was and is claimed by your petitioner that there was no violation of said Federal Safety appliance act by your petitioner. It appears from the evidence that it was not necessary for respondent's — to have gone between said cars to uncouple them and that the same could have been uncoupled with the safety appliances then on the cars, without going between them, if he had used such appliances. That your petitioner had complied with said acts, and said respondent was not entitled to recover against your petitioner for any violation thereof, and also that under said federal safety appliance
149 acts, said respondent was not entitled to recover where the undisputed facts show that respondent's deceased received his injuries in direct violation of and contrary to the written rules and instructions of your petitioner, by said respondent's deceased, and which he had agreed to observe and obey, and that under said safety appliance acts, as construed and interpreted by the circuit court of appeals of the United States, and the Supreme Court of the United States, no recovery can be had against your petitioner in said cause. Your petitioner further claims that under the terms of said act, no cause of action has been established against it, and that if the supreme court of the state of Minnesota had applied and observed the terms and provisions of said acts, as construed by the federal courts of the United States, no recovery can be had against your petitioner, and that said award, as well as judgment entered thereon pursuant to the direction and order of the supreme court of the State of Minnesota was and is in conflict with and contrary to the terms and provisions of the federal safety appliance act, and also contrary to and in violation of your petitioner's rights and immunities thereunder, as well as under the decisions of the federal courts of the United States, in construing and applying said federal safety appliance acts.

IV.

That said supreme court of the state of Minnesota was and is the tribunal having jurisdiction in the state of Minnesota, to render final judgment, so far as the state of Minnesota is concerned, in all
150 actions of the nature of the above entitled cause, and that such judgment of the supreme court of the state of Minnesota is a final judgment rendered by the court of last resort in the state of Minnesota.

V.

That said final judgment of the supreme court of the state of Minnesota is against each and all of the rights and immunities so made and claimed by your petitioner, under said Act of Congress, and necessarily denies to your petitioner each and all of the rights and immunities so claimed by it under said Act of Congress, as construed and interpreted by the Circuit Court of Appeals, and the Supreme Court of the United States, all of which will more fully appear in the records of said proceedings now remaining in said Supreme Court.

VI.

That the amount sought to be recovered in said action, and covered by the rights of your petitioner, so claimed under said Act of Congress, and for which judgment has been rendered, as above stated, against your petitioner, is more than three thousand (3,000) dollars.

Wherefore, for as much as your petitioner prays that there was manifest error in said decision of said court against the several claims of your petitioners, as hereinbefore set forth, and in the final judgment in said action, which is to the great damage of your petitioner, your petitioner prays that your Honor will examine the records of said supreme court of the state of Minnesota, in their behalf, and allow your petitioner a writ of error to the end
151 that said judgment and record may be brought before the Supreme Court of the United States, agreeable to the laws of the United States in that behalf enacted.

Dated this 21 day of June, A. D. 1913.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY,
By M. D. MUNN, *Its Attorney.*

STATE OF MINNESOTA,
County of Ramsey, ss:

M. D. MUNN, being first duly sworn, on oath says that he is the attorney for the petitioner above named, that he has read the said petition and knows the contents thereof, and that the same is true to the best of affiant's knowledge and belief.

Subscribed and sworn to before me this 23rd day of June, A. D. 1913.

M. D. MUNN.

[SEAL.] I. A .CASWELL,
Clerk Supreme Court.

On reading the foregoing petition, and upon said petition, and record, submitted therewith,

It is hereby ordered that the Writ of Error in said petition prayed for be and the same is hereby allowed, provided, however, that the

said petitioner gives a bond, according to law, in the sum of Four thousand (4,000) dollars, to be a supersedeas bond.

Dated June 23, 1913.

CALVIN L. BROWN,
Chief Justice of the Supreme Court of the State of Minnesota.

152 *Certificate of Lodgment.*

SUPREME COURT,
State of Minnesota, ss:

I, I. A. Caswell, Clerk of said Court, do hereby certify that there were lodged with me as such clerk on June 24, 1913, in the matter of Michael A. Popplar, as administrator of the estate of Richard S. Popplar, deceased, Respondent, vs. Minneapolis, St. Paul & Sault Ste. Marie Railway Company, Appellant:

The Original Bond and Original Petition for Writ of Error and Original Order Allowing Said Writ, of which copies are herein set forth.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at my office in St. Paul, Minnesota, this 25th day of June, 1913.

[Seal of the Supreme Court, State of Minnesota.]

I. A. CASWELL,
Clerk Supreme Court of Minnesota.

153 In the Supreme Court of the United States.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY,
Plaintiff in Error,
vs.
MICHAEL A. POPPLAR, as Administrator of the Estate of Richard S. Popplar, Deceased, Defendant in Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Supreme Court of the State of Minnesota, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Minnesota, before you or some of you, being the highest Court of Law or equity of the said State in which a decision could be had in the said suit between the Minneapolis, St. Paul & Sault Ste. Marie Railway Company, Plaintiff in Error, and Defendant, and Michael A. Popplar, as Administrator of the estate of Richard S. Popplar, deceased, Defendant in Error, and Plaintiff, wherein was drawn into question the construction and effect of certain Acts of Congress of the United States, and decision against the rights and immunities claimed by Defendant and Plaintiff in Error, under

the said Acts of Congress, and wherein said Acts of Congress were construed against the rights and immunities so claimed by said Plaintiff in Error, especially set up and asserted under said Acts of Congress, a manifest error hath happened to the great damage of said Minneapolis, St. Paul & Sault Ste. Marie Railway Company, Plaintiff in Error, as by its Complaint appears, and we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to and between the parties aforesaid, do command you, if judgment be therein given, that then, under
154 your seal, distinctly and openly you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States, together with this Writ, so that you may have the same at Washington on the 23rd day of July, next, in said Supreme Court of the United States to be then and there held, that the record and proceedings aforesaid be inspected, the said Supreme Court of the United States may cause further to be done therein, to correct that error what of right and according to the laws and customs of the United States should be done.

Witness, the Hon. Edward Douglass White, Chief Justice of the United States, this 28th day of June, A. D. 1913.

[Seal U. S. Dist. Court, Dist. of Minnesota, Third Division.]

CHARLES L. SPENCER,
Clerk of the District Court
of the United States of America,
for the District of Minnesota.

155 [Endorsed:] 17918. Original. Supreme Court of the United States. Minneapolis, St. Paul & Sault Ste. Marie Railway Company, Plaintiffs in Error, vs. Michael A. Popplar, as Administrator of the estate of Richard S. Popplar, Deceased, Defendant in Error. Filed Jun- 24, 1913. I. A. Caswell, Clerk. M. D. Munn, Att'y for Plaintiff in Error, 1501-2 1520 Pioneer Bldg., St. Paul, Minn.

156 Supreme Court of the United States.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY,
Plaintiff in Error,
vs.
MICHAEL A. POPPLAR, as Administrator, Defendant in Error.

Assignments of Error.

Now comes the Plaintiff in Error, in the above entitled cause, and avers and shows that in the records and proceedings in said cause, the Supreme Court of the State of Minnesota erred to the grievous injury and wrong of the Plaintiff in Error herein, and to the prejudice and against the rights of the Plaintiff in Error herein, in the following particulars, to-wit:

I.

The Supreme Court of the State of Minnesota erred in holding and deciding that the Safety Appliance Acts passed by the Congress of the United States imposed an absolute duty upon plaintiff in error to have the automatic couplers upon its cars, engaged in interstate commerce, in such condition at all times that when operated in the ordinary and customary way, the same can be operated without going between the cars, regardless of all conditions or circumstances, or when such defective condition arose.

II.

The Supreme Court of the State of Minnesota erred in holding and deciding that under the evidence in this case, the automatic coupling devices on the cars in question were not in order, and did not comply with the requirements of the Federal Safety Appliance Acts, relating thereto.

157 III.

The Supreme Court of the State of Minnesota erred in holding and deciding in this case, that plaintiff in error is responsible for any injury that may result by reason of any part or portion of the coupling appliances upon its cars, being out of order, regardless of the time, when or how such alleged defective condition arose.

IV.

The Supreme Court of the State of Minnesota erred in holding and deciding that the defendant in error was entitled to recover in this case, because the Safety coupling appliance on the end of one of the cars in question was defective, notwithstanding the fact that there was a safety coupling appliance on the end of the other car, next to the end of the car on which such defective coupling appliance is claimed to have been defective, and which the undisputed testimony in this case shows defendant in error's deceased could have used and thus made the uncoupling without going in between said cars.

V.

The Supreme Court of the State of Minnesota erred in holding and deciding that the testimony in this case established the fact that the coupling appliance which it is claimed said deceased attempted to use, for the purpose of lifting the pin, was defective.

VI.

The Supreme Court of the State of Minnesota erred in holding and deciding that defendant in error is entitled to recover notwithstanding there was a coupling appliance on the end of each of the two cars in question, where coupled together, one of which it is admitted was in sound and working order, and the other of which

it is claimed would not work, and said deceased stepped in between said cars while moving at the rate of four miles per hour, in violation of the written rules and instructions of the plaintiff in error, instead of using the coupling appliance which was in order,
158 and with which the uncoupling could have been done, without going between said cars.

VII.

The Supreme Court of the State of Minnesota erred in holding and decreeing that on the record in this case, defendant in error's deceased, in going between said cars while in motion, was not guilty of contributory negligence, under the terms and provisions of the Federal Safety Appliance Acts, as construed and applied by the Federal Courts, when it appears that such action was contrary to and in direct violation of the written rules and instructions of the plaintiff in error, and which were well known to said deceased.

VIII.

The Supreme Court of the State of Minnesota erred in holding and decreeing as follows:

"Defendant contends that the evidence is conclusive that Popplar was guilty of contributory negligence * * * We must accordingly determine whether contributory negligence was conclusively established. In our judgment it was not. Defendant's contention is this, that the pin which was operated by the lever on the opposite side of the cars was in proper condition; that Popplar could have made the uncoupling with safety by using that lever, and that under the circumstances, it was contributory negligence as a matter of law, to go between the cars while in motion. A rule laid down in some of the Federal Courts invoked, to-wit: that the act of Congress contemplates that brakemen should not go between cars, and that where two ways are open to an employe, to perform a certain act, one safe, the other unsafe, and the employe adopts the unsafe method, the employe cannot recover. This rule has been applied to cases similar to this and recovery denied. Perhaps the leading case of this sort is Gilbert v. Burlington C. R. & N. Ry. Co. (C. C. A., 8th Circuit) 128 Fed. 529. Within certain limitations the rule is doubtless sound, that where a safe and an unsafe way are open to an employe, he is obliged to choose
159 the safe way. The application of that doctrine made in the Gilbert case, is, however, distinctly disapproved by the United States Circuit Court of Appeals, for the 7th circuit in the later case of Chicago R. I. & Pac. Ry. Co. v. Brown 185, Fed. 81; and this case was followed and applied in Grand Trunk Western Ry. Co. v. Lindsay, 201 Fed. 836. * * * The question whether it was negligence for Popplar to go between the cars under the circumstances here presented, was a question for the Jury."

IX.

The Supreme Court of the State of Minnesota erred in holding and decreeing as follows:

"It is also urged that recovery must be denied because deceased at the time of the accident, was violating a rule of the company. It appears that in April, 1908, defendant promulgated a rule for brakemen and others, which read, "Under no circumstances will you go between moving cars or engines to open or adjust couplings, or for any other purpose." On May 12, 1908, Popplar signed a receipt for this circular, which read, "General Superintendent's Circular No. 176 of April 30, 1908, relative to going between moving cars and engines, received this date and instructions will be complied with." Popplar did violate this rule when he went between these moving cars. It is contended that this is negligence per se. Ordinarily the violation by an employe of a rule of the employer made for the protection of employes constitutes negligence per se. But this doctrine is not an absolute one. It yields to practical necessity. Green v. Brainerd & Northern Minn. Ry. Co., 85 Minn., 322; Punds v. C. G. W. Ry. Co., 114 Minn., 312. If the employer has himself failed to comply with some requirement of law and such failure makes it impossible for the employe to do his work in the usual way, this may excuse him in the violation of such a rule. It does excuse him if he follows a method of doing the work which is the only method reasonably practicable under the circumstances, or which is a method which a reasonably prudent man would follow."

160

X.

The Supreme Court of the State of Minnesota erred in holding and decreeing as follows:

"The rule must be construed in connection with the safety appliance act. The course for an employe to pursue when a coupling pin does not operate as the law requires, is nowhere pointed out in any rule. Does the rule contemplate that he should abandon the "kicking" operation, stop the train, and walk around to the pin lifter on the other side. The conductor, speaking as a practical railroad man, said "that wouldn't be necessary; you could stop it right there and stand still, not necessarily go around" that is to say, you could go in between the cars while they were standing and pull the other pin. In this view defendant's counsel seem to concur. They argue that, "there was a perfectly safe way for Popplar to have performed the work—and observed the written instructions, namely, by stopping the train and then either going around to the other side or "by stepping in between the cars while they were standing still." But if the rule contemplates this method, it is clear that the statute does not. The necessity of going between the cars while standing is one of the things which, for obvious reasons, the statute was designed to avoid."

XI.

The Supreme Court of the State of Minnesota erred in holding and decreeing that the condition of the coupling appliance in question at the time, if in any manner defective, was due to the negligence of the plaintiff in error, or that plaintiff in error was in any way responsible therefor.

XII.

The Supreme Court of the State of Minnesota erred in holding and decreeing that as in this case where two cars are coupled together and there is a safety coupling appliance on the end of each of the two cars, so coupled together, and where coupled together, one of which is in sound and working order, and the other of which, for any cause, at the time, cannot be used, that said deceased
161 was justified in stepping in between such cars while in motion in violation of the written instructions of the plaintiff in error, instead of using the sound coupling appliance on the other car.

XIII.

The Supreme Court of the State of Minnesota erred in denying plaintiff in error's motion in the alternative, for judgment notwithstanding the verdict, or for a new trial, and in giving judgment in favor of the defendant in error.

XIV.

The Supreme Court of the State of Minnesota erred in not ordering and rendering judgment in favor of the plaintiff in error.

Dated this 23rd day of June, 1913.

THE MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY,
M. D. MUNN.
By J. L. ERDALL, *Its Solicitors.*

162 [Endorsed:] 17918. Original. Supreme Court of the United States. Minneapolis, St. Paul & Sault Ste. Marie Railway Company, vs. Michael A. Popplar, Admr. of the estate of Richard S. Popplar. Assignments of Error. Filed Jun- 24, 1913. I. A. Caswell, Clerk. M. D. Munn, Att'y for Plaintiff in Error, 1501-2 1520 Pioneer Bldg., St. Paul, Minn.

162½ STATE OF MINNESOTA,
County of Ramsey, ss:

E. O. Wergedahl being by me first duly sworn, on oath deposes and says that on the 24th day of June, A. D. 1913, in the City of St. Paul, State of Minnesota, he served the within and hereto attached Citation on Samuel A. Anderson, Attorney for Michael A. Popplar, Administrator, plaintiff and respondent, by then and there

handing to and leaving with said Samuel A. Anderson, a true and correct copy thereof.

E. O. WERGEDAHL.

Subscribed and sworn to before me this 24th day of June, A. D. 1913.

[Notorial Seal, Ramsey County, Minn.]

MARY T. DESMOND,
Notary Public, Ramsey County, Minn.

My Commission Expires Dec. 16, 1914.

163 Supreme Court of the United States.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY,
Plaintiff in Error,
vs.
MICHAEL A. POPPLAR, as Administrator, Defendant in Error.

Citation.

To Michael A. Popplar, as Administrator of the estate of Richard S. Popplar, Deceased, Defendant in Error above named:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States in Washington, within thirty, (30) days from the date hereof, pursuant to the Writ of Error filed in the Clerk's office of the Supreme Court of the State of Minnesota, wherein the Minneapolis, St. Paul & Sault Ste. Marie Railway Company is Plaintiff in Error and you are Defendant in Error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said Writ of Error mentioned, should not be corrected and why speedy justice should not be done in that behalf.

Witness, the Honorable C. L. Brown, Chief Justice of the Supreme Court of the State of Minnesota, this 23rd day of June, A. D. 1913.

CALVIN L. BROWN,
Chief Justice.

164 [Endorsed:] 17918. Original. Supreme Court of the United States. Minneapolis, St. Paul & Sault Ste. Marie Railway Company, Plaintiff in Error vs. Michael A. Popplar, Defendant in Error. Citation. Filed Jun- 24, 1913. I. A. Caswell, Clerk. M. D. Munn, Att'y for Plaintiff in Error, 1501-2 Pioneer Bldg.

165 *Return to Writ.*

UNITED STATES OF AMERICA,
Supreme Court of Minnesota, ss:

In obedience to the commands of the within Writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Minnesota, in the City of St. Paul, this June 25th, A. D. 1913.

[Seal of the Supreme Court, State of Minnesota.]

I. A. CASWELL,
Clerk Supreme Court of Minnesota.

Endorsed on cover: File No. 23,804. Minnesota Supreme Court. Term No. 223. Minneapolis, St. Paul & Sault Ste. Marie Railway Company, plaintiff in error, vs. Michael A. Popplar, as administrator of the estate of Richard S. Popplar, deceased. Filed July 28th, 1913. File No. 23,804.

Supreme Court of the United States

OCTOBER TERM, 1914.

No. 223.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY,
Plaintiff in Error,

vs.

MICHAEL A. POPPLAR, as Administrator of the Estate of RICHARD S. POPPLAR, Deceased,
Defendant in Error.

M. D. MUNN,
Solicitor for Plaintiff in Error.

A. H. BRIGHT,
J. L. ERDALL,
Of Counsel.

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vs.

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Defendant in Error.

STATEMENT OF THE CASE.

This case comes up on a Writ of Error to the Supreme Court of the State of Minnesota, from its final judgment, involving the construction and application of the so called "Safety Appliance Act" passed by the Congress of the United States in 1908. The case is reported in 121 Minn., page 413, also printed at pages 77 to 82 of record.

It is alleged in the complaint that the plaintiff in error is engaged in interstate commerce, and that the station maintained at Mahnomen, where this accident

occurred, is a division point on its interstate railway. It is further alleged that the cars between which defendant in error's intestate was injured, were cars used by plaintiff in error when occasion required, in interstate business. This is admitted. It is then alleged that the coupling appliance on one of these cars was defective. The Safety Appliance Act is not specifically referred to in the complaint, but the facts alleged clearly show that the right of recovery is based upon the failure of plaintiff in error to comply with the requirements of the Federal Safety Appliance Act, as set forth in the complaint. The trial court, in charging the jury, stated:

> "The action is based on a charge of negligence, and the negligence alleged and claimed consists, if at all, in the failure to have the cars which were in use at that time, equipped with automatic couplers, as required by the federal statute, which will couple upon impact and which may be uncoupled without the necessity of a man going between the ends of the cars."

See Folio 89 of the record.

Three questions are presented on this appeal.

First, whether or not there is either sufficient evidence or any evidence, to sustain the charge of violation of the Federal Safety Appliance Act.

Second, whether under the facts disclosed by the record, the Federal Safety Appliance Act should be construed and applied in the manner adopted by the Supreme Court of Minnesota.

Third, whether the rule of contributory negligence is modified by the Safety Appliance Act so that the same should be construed and applied in the manner adopted by the Supreme Court of Minnesota.

The facts, briefly stated, are as follows:

Defendant in error's intestate, whose name was R. S. Popplar, and whom we will hereafter refer to as Popplar, was in the employ of the plaintiff in error as a brakeman, and had been in such employment for a period of a year and a half, and was thoroughly experienced in that work. Plaintiff in error is engaged in operating a railroad, extending through several states, and maintains a division point on said railroad at Mahnomen, Minnesota. At this division point, trains are made up for movement on various divisions of said railway, for state and interstate business. At Mahnomen, besides the main line of railroad, there are several lead tracks, or sidings, on which trains are made up and cars are stored when not required for use in any train about to be gathered for distribution.

During the forenoon of September 6, 1909, plaintiff in error was making up a freight train at Mahnomen, and in the process it became necessary to set one car, which was coupled to another, going into the train, on to one of these side tracks. This car had to be switched from the lead track on to the side or storage track. The conductor in charge of the freight train being made up, directed Popplar to set such car on to the siding. The handling of the engine and the two cars, one of which was to be set on the siding, was under the charge and direction of said Popplar. The entire movement of the engine and the cars was under his control and direction at the time he received his injuries. The engine, with these two cars attached was moving about four miles an hour, proceeding backwards for the purpose of "kicking" the car in on to the siding. The process of kicking is done by the brakeman, when he reaches a point where he wishes a car to be kicked, giving a signal to the engineer to

stop the engine and the brakeman simultaneously lifting the pin, allowing the momentum of the car to be disposed of, to carry it in on the siding.

It is claimed that said Popplar, when the engine with the two cars, one of which was to be kicked in as above stated, reached a point at or near the siding, gave the signal to the engineer to stop and then attempted to lift the pin by the coupling appliance on the end of the car. That Popplar tried the lever three or four times, and not succeeding in lifting the same, he stepped in between the cars then moving at the rate of four miles an hour, and attempted to lift the pin on the end of the other car by hand, for the purpose of making the uncoupling. While running along between the cars, he stumbled and fell and was run over, receiving the injuries which resulted in his death. Both the cars and the engine were equipped with automatic coupling devices as required by the Act of Congress. Each car had a lever and appliance for lifting the pin on each end, on diagonally opposite corners. The lever which it is claimed Popplar attempted to use, was on the car coupled to the engine, on the end furtherest from the engine, and on the fireman's side. The same kind of an appliance was on the end of the rear car, on the end towards the engine, but on the side opposite Popplar.

It is alleged in the complaint that the lever and coupling appliance which said Popplar attempted to use was:

> "in a defective condition, in that the pin lever would not work, and said car could not be uncoupled without the necessity of going between the same; that the coupling pin and the automatic coupling device was bent, worn, and defective, and would not respond to the pin lever thereto

attached, and that the end of the other car projected over and out to such an extent as to render it impossible to operate said pin lever thereon, and so uncouple said cars."

The complaint further alleges that it was the duty of said Popplar to then go in between said cars for the purpose of uncoupling the same by hand. It is further stated in the complaint, that the guard rails were not properly blocked, and unsafe and dangerous, but no testimony was introduced tending to show this, or that there was anything on the end of the other car which projected over and out so as to interfere with or render it impossible to operate the lever and pin on the end of that car, and each one of these claims was abandoned at the trial, so that the sole claim of negligence relied upon at the trial is that the coupling device and appliance which said Popplar attempted to use on the car next to the engine, was out of order, in the manner alleged.

The only testimony presented by the defendant in error on this allegation is that of the witness Kornell, whose testimony is found on pages 9 to 17, inclusive, of the record. This witness stated that he was walking near Popplar at the time, and saw him take hold of the lever on the end of the car next to the engine and fartherest from him, and attempt to lift the pin three or four times, and then saw him go in between the cars. That the cars were moving at the time, at the rate of four miles per hour. (See Fols. 19 and 20 of the record.)

This same witness also testified that after the accident he tried to lift the pin with the lever and could not, but does not state under what circumstances he tried it. This witness also stated that he could not

tell what was the trouble, nor did he discover any defect in the appliance. (See Fol. 21 of the record.)

Plaintiff in error introduced the testimony of four witnesses, each of whom examined this lever and coupling appliance immediately or shortly after the accident, and all of whom testified that the lever and pin worked with the usual ease, excepting one, who stated that it worked a little hard. All of these witnesses testified that they could discover no defect or imperfection in the coupling appliance or lever. The testimony of these witness appears on pages 22 to 62, inclusive, of the record.

It is undisputed that the coupling appliance on the end of the other car, next to the one which it it alleged Popplar attempted to use, was in good working order, and would have lifted the pin and made the uncoupling. It is also undisputed that where an engine is pushing two cars, as was being done at the time of the accident, the slack between the cars is up; that is, the coupling appliances are pushed together so that there is no slack between the cars, but that as soon as the engine stops, the remaining cars will continue to move and immediately pull out the slack, and when this is done, the coupling tightens up so as to bind the pin. Thus, in order to make an uncoupling while the train is being pushed and still in motion, the pin must be lifted before the engine begins to stop. (See Fols. 35 and 36 of the record.)

The witness Kornell testified that he saw Popplar at or about the time he took hold of the lever, give the stop signal to the engineer. (See Fol. 24 of the record.)

Under those conditions, as described by the witness Leach, the slack would immediately run out and bind the pin, unless it was lifted before or simultaneously with the giving of the stop signal. It is also undis-

puted that the plaintiff in error on the 30th of April, 1908, immediately following the passage of the Employers' Liability Act, issued its circular No. 176, as follows:

"SOO LINE.

MINNEAPOLIS, ST. PAUL AND SAULT STE. MARIE RY.

OFFICE OF GENERAL SUPERINTENDENT.

Circular No. 176.

Minneapolis, April 30, 1908.

Conductors, Brakemen, Switchmen and All Concerned:

Your attention is called to Rule 42 for the Operating Department. Under no circumstances will you go between moving cars or engines to open or adjust couplings, or for any other purpose.

G. R. HUNTINGTON,
General Superintendent."

and that Popplar received this circular and made written acknowledgement thereof, as follows:

"Thief River Falls Station, 5-12, 1908.

J. R. Michaels, Superintendent, Thief River Falls, 3-3618:

General Superintendent's Circular No. 176, of April 30, 1908, relative to going between moving cars and engines, received this date and instructions will be complied with.

RICHARD POPPLAR,
B'k'm.,
Occupation."

This circular, and receipt, which are Exhibits two and Three, are found on pages 68 and 69 of the record.

The testimony showing the issuance of this circular, is found on pages 56 and 57 of the record.

As above stated, Popplar was in sole charge of the movement of this engine and the two cars, at the time he received his injuries, and had full control over the movement of the same. The undisputed testimony shows that if he found he could not make the uncoupling by the lever, it was his duty to have stopped the movement of the engine and cars, and reported the condition of the appliance, if found defective. (See Fol. 55 of the record.) There was no emergency or occasion which required or justified his stepping in between the cars while in motion, in violation of the written instructions.

ERRORS ASSIGNED AND RELIED UPON.

I.

The Supreme Court of the State of Minnesota erred in holding and deciding that under the evidence in this case, the automatic coupling devices on the cars in question were not in order, and did not comply with the requirements of the Federal Safety Appliance Act, relating thereto.

II.

The Supreme Court of the State of Minnesota erred in holding and deciding in this case, that plaintiff in error is responsible for any injury that may result by reason of any part or portion of the coupling appliance upon its cars, being out of order, regardless of the time, when or how such alleged defective condition arose.

III.

The Supreme Court of the State of Minnesota erred in holding and deciding that the defendant in error was entitled to recover in this case, because the safety coupling appliance on the end of one of the cars in question was defective, notwithstanding the fact that there was a safety coupling appliance on the end of the other car, next to the end of the car on which such defective coupling appliance is claimed to have been defective, and which the undisputed testimony in this case shows defendant in error's intestate could have used and thus made the uncoupling without going in between said cars.

IV.

The Supreme Court of the State of Minnesota erred in holding and deciding that the testimony in this case established the fact that the coupling appliance which it is claimed said deceased attempted to use, for the purpose of lifting the pin, was defective.

V.

The Supreme Court of the State of Minnesota erred in holding and decreeing that on the record in this case, defendant in error's intestate, in going between said cars while in motion, was not guilty of contributory negligence, under the terms and provisions of the Federal Safety Appliance Act, as construed and applied by the Federal Courts, when it appears that such action was contrary to and in direct violation of the written rules and instructions of the plaintiff in error, and which were well known to said deceased.

VI.

The Supreme Court of the State of Minnesota erred in holding and decreeing as follows:

> "Defendant contends that the evidence is conclusive that Popplar was guilty of contributory negligence * * * We must accordingly determine whether contributory negligence was conclusively established. In our judgment it was not. Defendant's contention is this, that the pin which was operated by the lever on the opposite side of the cars was in proper condition; that Popplar could have made the uncoupling with safety by using that lever, and that under the circumstances, it was contributory negligence as a matter of law, to go between the cars while in motion. A rule laid down in some of the Federal Courts invoked, to-wit: that the act of Congress contemplates that brakemen should not go between cars, and that where two ways are open to an employe to perform a certain act, one safe, the other unsafe, and the employe adopts the unsafe method, the employe cannot recover. This rule has been applied to cases similar to this and recovery denied. Perhaps the leading case of this sort is *Gilbert v. Burlington C. R. & N. Ry. Co.* (C. C. A., 8th Circuit), 128 Fed. 529. Within certain limitations the rule is doubtless sound, that where a safe and an unsafe way are open to an employe, he is obliged to choose the safe way. The application of that doctrine made in the Gilbert case is, however, distinctly disapproved by the United States Circuit Court of Appeals for the 7th Circuit in the later case of *Chicago, R. I. & Pac Ry. Co v. Brown* 185, Fed. 81; and this case was followed and applied in *Grand Trunk Western Ry. Co. v. Lindsay*, 201 Fed. 836. * * * The question whether it was negligence for Popplar to go between the cars under the circumstances here presented was a question for the Jury."

VII.

The Supreme Court of the State of Minnesota erred in holding and decreeing as follows:

> "It is also urged that recovery must be denied because deceased, at the time of the accident, was violating a rule of the company. It appears that in April, 1908, defendant promulgated a rule for brakemen and others, which read, 'Under no circumstances will you go between moving cars or engines to open or adjust couplings, or for any other purpose.' On May 12, 1908, Popplar signed a receipt for this circular, which read, 'General Superintendent's Circular No. 176 of April 30, 1908, relative to going between moving cars and engines, received this date and instructions will be complied with.' Popplar did violate this rule when he went between these moving cars. It is contended that this is negligence per se. Ordinarily the violation by an employe of a rule of the employer made for the protection of employes constitutes negligence per se. But this doctrine is not an absolute one. It yields to practical necessity. *Green v. Brainerd & Northern Minn. Ry. Co.*, 85 Minn., 322; *Punds v. C. G. W. Ry. Co.*, 114 Minn., 312. If the employer has himself failed to comply with some requirement of law and such failure makes it impossible for the employe to do his work in the usual way, this may excuse him in the violation of such a rule. It does excuse him if he follows a method of doing the work which is the only method reasonably practicable under the circumstances, or which is a method which a reasonably prudent man would follow."

VIII.

The Supreme Court of the State of Minnesota erred in holding and decreeing as follows:

"The rule must be construed in connection with the safety appliance act. The course for an employe to pursue when a coupling pin does not operate as the law requires, is no where pointed out in any rule. Does the rule contemplate that he should abandon the 'kicking' operation, stop the train, and walk around to the pin lifter on the other side. The conductor, speaking as a practical railroad man, said 'that wouldn't be necessary; you could stop it right there and stand still, not necessarily go around;' that is to say, you could go in between the cars while they were standing and pull the other pin. In this view defendant's counsel seem to concur. They argue that, 'there was a perfectly safe way for Popplar to have performed the work—and observed the written instructions, namely, by stopping the train and then either going around to the other side or 'by stepping in between the cars while they were standing still.' But if the rule contemplates this method, it is clear that the statute does not. The necessity of going between the cars while standing is one of the things which, for obvious reasons, the statute was designed to avoid."

IX.

The Supreme Court of the State of Minnesota erred in holding and decreeing that as in this case where two cars are coupled together and there is a safety coupling appliance on the end of each of the two cars, so coupled together, and where coupled together, one of which is in sound and working order, and the other of which for any cause, at the time cannot be used, that said deceased was justified in stepping in between such cars while in motion in violation of the written instructions of the plaintiff in error, instead of using the sound coupling appliance on the other car.

X.

The Supreme Court of the State of Minnesota erred in denying plaintiff in error's motion in the alternative, for judgment notwithstanding the verdict, or for a new trial, and in giving judgment in favor of the defendant in error.

ARGUMENT.

I.

We contend there is not sufficient evidence to justify the conclusion that there was a defect in the coupling appliance. We have already quoted the allegation of the complaint which specified certain defects, namely, "that the coupling pin in the automatic coupler appliance on one end of the car was bent, worn and defective." There is no testimony to substantiate this allegation, nor is there any direct testimony of any defect in the coupling appliance. The witness Kornell, the only one called by the defendant in error, testified that he was unable to state what the trouble with the coupler was, or that there was any defect in it. All he testified to was that he saw Popplar try to lift it by jerking on the lever three or four times after he had given the signal for the engine to stop. This does not disclose any defect, and Popplar's inability to lift the pin at that time, and under those conditions is fully explained by the fact that he attempted to lift the pin at the same time or just after he had signaled the engine to stop. (See Folio 24 of the record.) The slack between the cars would immediately run out, and thus bind the pin so that it could not be lifted This is clearly shown by the testimony of conductor Leach, found on page 38 of the record, as follows:

"If the engine is running four miles an hour and is pushing two cars, we will say, that weigh two or three tons apiece, and the engineer begins to slack the speed of the engine, what happens, so far as those cars are concerned?

A. The slack would run out.

Q. Run right out and draw this up like that, wouldn't it?

A. Yes, sir.

Q. And that will continue in that condition until the speed of the engine has become greater than the speed of the car, until they come together again?

A. Yes, sir.

Objected to as leading.

Mr. Munn: This is redirect, and I submit it on the cross you have had here.

Q. Now, the question of whether or not that pin could be pulled depends entirely upon the relative speed of that engine and those cars, doesn't it?

A. Yes, sir.

Q. As to whether the engine was running faster or slower than those cars?

A. Yes, sir.

Q. And when you said that it could be pulled any instant, did you wish to be so stating?

A. Any instant they had the slack.

Q. The slack is up, of course. Now, if Mr. Popplar had given the signal to the engineer to slacken up or stop before he tried to lift that pin, and the engineer actually began to slacken, that would be bound so he couldn't lift it?

A. The slack would run out so he couldn't lift it.

Q. And that would remain that way until the speed of the engine had again become greater than the speed of the car?

Objected to as leading and suggestive. I think he can state the facts as to what occurred.

The Court: The same thing he said before. I don't think it is prejudicial, it helps to get it clearer in this way.

Q. Would that condition have remained until the speed of the engine became greater than the speed of the car?

A. Yes, sir, you couldn't—

Q. What do you mean by "Yes, sir, you couldn't?"

A. I mean you couldn't pull the pin until you had the slack again."

The witness Kornell does not state under what conditions he attempted to lift the pin after the accident. On the contrary, he says he does not know what the trouble was, or what bound the pin. The four witnesses who examined this coupling appliance a few moments after the accident, and after the two cars had separated, testified that they used the lever and that the lever which said Popplar tried to use, lifted the pin in the usual way, showing there was no defect before that time. One of these witnesses testified that it worked a little hard, but not much harder than usual. (See Fol. 48 of the record.) This appliance worked successfully when the car was coupled on the day before when the train came in to Mahnomen. The train with this car, was inspected after coming in the evening before. (See Fol. 73 of the record.)

It is impossible for these coupling appliances to work at all times and under all conditions with the utmost freedom and ease. It is common knowledge that conditions such as the slack being in or out between the cars, weather exposure, and numerous other conditions will make it difficult to lift these pins with the lever on some occasions. As stated by the Circuit Court of Appeals in *Union Pac. Ry. Co. v. Brady*, 161 Fed. p. 719, this does not imply a defect in the condition of the

mechanism, so long as the appliance is of the approved standard pattern.

The Court said:

> "He admitted it was a very common occurrence for the effective operation of a coupling appliance to require several forcible jerks of the lever —as many as three or four. This is naturally so and it does not imply a defect in the condition of the mechanism if it is of an improved pattern. Exposure to weather and rust will cause the best of them to work hardly at times, and the connecting link or links will occasionally become cramped."

It seems to us that the defendant in error has failed to either establish the specific defect which he alleges in his complaint as existing in this coupling appliance, or any defect whatever, and therefore has failed to show any failure on the part of the plaintiff in error to comply with the Safety Appliance Act. We most earnestly contend that plaintiff in error is entitled to a strict enforcement of the rules of evidence in this case, in view of the absolute conditions imposed by the Statute, as construed by this court in the decisions which we shall refer to in the next subdivision.

The defendant in error alleges specific defects in the coupling device. It cannot be urged that there is any evidence to support any such claim of specific defect, and if held to the strict rules of pleading, defendant in error has failed to establish his case; but we go beyond that, and contend that there is not sufficient evidence to sustain the claim of any defect in the coupling appliance. That the overwhelming testimony shows that the coupling device fully complied with the requirements of the Safety Appliance Act.

II.

We contend that under the Safety Appliance Act, there can be no recovery in this case. It seems to us that this is one of the cases where even the burdensome rule imposed by the Safety Appliance Act, as construed by this Court in *Railway Company against Taylor*, 210 U. S. 281, and further applied in *C. B. & Q. Railway Company against U. S.*, 220, U. S. p. 559, does not apply.

In the case of *Delk against Railway Company*, 220 U. S. page 587, this court held that when an action is brought and can be maintained under the Federal Employers' Liability Act, for injuries caused by a violation of the Safety Appliance Act, then recovery is permitted notwithstanding the contributory negligence of the party injured. In other words, the Employers' Liability Act in all cases where recovery is sought under its provision, amounts to an amendment of the Safety Appliance Act, to the extent of abolishing the defense under contributory negligence.

It is our understanding of this case, however, that where the cause of action does not come within the provisions of the Federal Employers' Liability Act, then the defense of contributory negligence is still open in an action to recover for violation of the Federal Safety Appliance Act.

The coupling appliance on the car in question had worked successfully up to the time that Popplar attempted to lift the pin, just prior to the time he received his injuries. And it did work successfully immediately following that time. That in all probability the reason why Popplar was unable to lift it with the lever at the time he tried to, was due to the fact that the pin was bound by the slack being run out. That if his inability to raise the pin was due to any other

fact or circumstance, then it was the duty of Popplar to immediately stop the engine and report the condition of the coupling appliance. (See Fol. 55 of the record.) That plaintiff in error, in order to carry out and fully observe the requirements of the Safety Appliance Act, issued its circular, Exhibit Three (3), found on page 69 of the record, absolutely prohibiting its employes going in between moving cars for any purpose whatever. Popplar received this circular and agreed to observe its requirements, as shown by Exhibit Two (2), page 68 of the record.

Under this testimony, it is just as though the President or General Manager of plaintiff in error had been standing by Popplar at the time he attempted to make this uncoupling, and said to him "I command you not to go between those cars, while in motion. Stop them at once before you do anything more." And Popplar had said: "I care not for what you say. I am going in between those cars against your commands," and he did so.

We contend under such circumstances, there can be no recovery. It is impossible to enforce a Legislative Mandate unless all parties upon whom it imposes a duty, observe it. Popplar was an employe of this railroad company, and it was a part of his duty to help enforce its provisions by observing the instructions of his master. He had no right or authority to disregard these written instructions. The only way plaintiff in error can observe this Statute and protect itself against its provisions is to have its instructions observed. It is entitled to determine when, if at all, they shall be disregarded. In order to protect itself, the company has a right to insist that its orders be observed. Popplar had no right to say a condition had arisen which justified or required him to disregard the

instructions. It was not left to him to so decide or act. He was told that under no circumstances shall he so do. These coupling appliances from necessity, under certain conditions will fail to work, and there is no possible way in which the Railway Company can discover this condition until the appliance fails to work. As soon as it fails to properly work, it then becomes the duty of the railway company to repair the appliance, or put it in condition so that it will work, and it is entitled to have the opportunity to do this before liability is imposed upon it.

In order to secure this opportunity the plaintiff in error in this case, issued its specific instructions above referred to, and as soon as Popplar discovered that he could not lift the pin with the appliance furnished the only duty then imposed upon him was to stop the train and report that fact. There was no emergency or condition which would either excuse or justify his doing anything else. There was no duty imposed upon him to do anything else. Under these instructions, he was not obliged to do another thing with this car, excepting to report the condition of this coupling appliance. In fact, it was his duty not to do anything else.

Under such conditions, it seems to us that the proximate cause of the injuries causing Popplar's death, is not any defective condition in the coupling appliance, but is Popplar's election or determination to disregard written instructions and attempt to do something which he was prohibited from doing. The Supreme Court of Minnesota, in this case said:

> "If the employer has himself failed to comply with some requirement of law and such failure makes it impossible for the employee to do his work in the usual way, this may excuse him in

> the violation of such a rule. It does excuse him if he follows a method *of doing the work* which is the only method reasonably practicable under the circumstances, or which is a method which a reasonably prudent man would follow."

The fallacy of this holding seems self evident. The Act of Congress has imposed an absolute duty on the company as held by this Court. Liability attaches as soon as the defective condition of the coupling appliance comes into existence. Supposing a coupling pin is bent by the sudden jerking or stopping of a train. Up to that time the pin and coupling applance was in sound condition and complied with the Act. But as soon as the pin is bent, it ceases to so comply. The brakeman in attempting to make a coupling after the pin is bent, is unable to do so. Under the instructions given by the plaintiff in error in this case, and the duty of the brakeman, as disclosed by the undisputed testimony in this case, that train ought to be stopped and this defective condition reported. The Supreme Court of Minnesota in effect holds that the brakeman in charge of the work could himself determine whether he should proceed and use the car thus rendered defective, in violation of the written instructions of the company, and render the Company liable under the Act for the penalties imposed as well as any injuries following. That is, the Court assumes that it was the duty of the brakeman to continue to use the car after the appliance had become defective, and for that reason decide whether or not the instructions of the master be obeyed or set aside. This is not true, and there is nothing in this case to show any such duty or requirement. On the contrary, the record specifically shows that no such duty or requirement existed. That both the duty

and requirement was not to use it, but to obey instructions and report the defect.

The Supreme Court of Minnesota said:

> "The rule must be construed in connection with the Safety Appliance Act."

This is only partially true; but when so construed it requires strict observance. To disregard it is to violate the Safety Appliance Act. To observe it is to conform to the Act, and Popplar had no option or choice in the matter. He had no authority or right to disregard the written instructions, and thus place his master in a position of violating the Safety Appliance Act. These two cars and engine were on a siding. The engine could have been uncoupled from the two cars, and left them standing on the siding. There was not a thing necessary to be done in connection with the car, in order to facilitate the moving of any train, or to clear any main line; therefore there is nothing to either justify or excuse Popplar in disregarding the written instructions given him, and thus place the company in a position where it can be claimed it has violated the Safety Appliance Act.

In the case of *Delk v. Ry. Co.*, 220 U. S. p. 580, it appeared that the railway company continued to use the car with the defective appliance after such defect was known, and directed its employees to use the car on which the defect existed, after notice of the defect. In that connection this Court said:

> "After the coupler became defective and could not be coupled without going between the ends of the cars, it became unlawful for the railroad company to haul it, or permit it to be hauled, or used, on its line. It then became the duty of the railroad company to withdraw the car from use,

> and have it repaired to conform with the law before using it further. It did not do this, but continued to use the car in that defective condition. It could only do this under the penalty of the law. The car was defective, liable at any time to cause an accident, and it could not be kept in use at the constant risk of a serious accident, either upon the excuse that it would be inconvenient to withdraw it from the service, or that the company had sent for the required appliance, and would repair the car when it should be received."

The only way that plaintiff in error can comply with the requirements of the Act is to have its written instructions observed, and its employee, Popplar in this case, neither had or ought to have the right to determine when or under what circumstances the Company shall or shall not comply with these requirements. The Supreme Court of Minnesota holds the employee has that right. Such a holding denies to the plaintiff in error both the right and opportunity of complying with the Act of Congress. The Supreme Court of Minnesota further comments upon the fact that the Safety Appliance Act was intended to avoid the necessity of going between the cars while standing still. This is doubtless true, but it is necessary for someone to go between the cars while standing still in order to either open, remove or repair a defective coupling appliance. Of course this can be done at a time when there is no danger, but the position the court has taken in its decision denies to the plaintiff in error the opportunity of doing this in a way so as not to violate the Statute, or render it liable. The amendment of the Safety Appliance Act, passed in April, 1910, which provides that the removal of such a car from the train in order to repair it shall be at the sole

risk of the company, does not apply in this case because the accident occurred in 1909.

The question in this case is not whether the uncoupling could be made when the train is in motion or standing still. The question is whether it should have been made at all by Popplar, under the conditions disclosed in this record. He did not attempt to nor was it his duty to make the uncoupling while the train was standing still. He elected to disregard the written instructions of the Company and attempted to make it while the train was in motion.

In the case of *Chicago R. I. & P. Ry. Co. against Brown*, 229 U. S., page 320, this court used this language:

> "And the concession is made that in the Taylor Case, 210 U. S. 281, and in *C., B. & Q. R. Co. v. United States*, 220 U. S. 559, this court settled that the failure of a coupler to work at any time sustains a charge of negligence in this respect, no matter how slight the pull on the coupling lever. And, further, 'The mere fact that the pin would not lift when plaintiff (Brown) endeavored to lift it makes a case of negligence under the first count.'"

We do not understand, from an examination of the Taylor and the C. B. & Q. cases, this court holds that the failure of the coupling appliance to work at any time, regardless of conditions, sustains a charge of negligence. We understand those cases to state the position of this court as follows:

If a coupling appliance fails to work, because of a *defect*, then that fact establishes a charge of negligence; but, if as in this case, Popplar's inability to lift the pin was due to the fact that the pin was bound by the slack being run out, then the mere fact that

the pin would not lift does not establish negligence. In other words, the Statute imposes the liability on the Company for permitting a car to be used on which the appliance does not comply with the Statute, because it is defective, and not because it fails to work, under the conditions over which the Company has no control.

Doubtless it is unnecessary to refer to this, and we should not do so were it not for the fact that the Railway Company in the Rock Island case seems to have made a concession which this court adopted as a part of its decision, inconsistent with this statement.

In presenting our contentions on this question we do not wish to be understood as claiming that the Railroad Company can permit the use of a car, knowing the appliance to be defective, and escape liability by the promulgation of a rule such as Exhibit Three (3). Our claim is simply this: that the Company is entitled to have its instructions observed as applied to a condition which first appears at the time of the accident; and that the failure of Popplar to obey the instructions of the Company under the conditions as they developed at the time he received his injuries, is the sole cause of the accident. That no act or ommission of the plaintiff in error entered into the causation, as stated by this Court in the case of the *Grand Trunk Ry. Co. v. Lindsay*, 233 U. S. p. 42. In the Lindsay case, as we understand the statement of facts, the employee was in the act of performing a part of his duty after the coupling appliance was found to be defective. It seems to have been conceded in that case, that it was the duty of the employee to go betwen the cars at the time in order to adjust the coupling appliance or discover the defect; but the Company claimed that the injuries received by the employee

were caused by his giving a signal to the engineer to "come ahead;" and that such action on his part was the proximate cause of his injuries. There was a conflict of testimony, however, on this question.

The Grand Trunk case presents quite a different question both as to the facts and the application of the law.

III.

We contend that the defense of contributory negligence is open to plaintiff in error and that under the facts in this case, it is in no way modified by the Federal Safety Appliance Act.

While it appears from the allegations in the Complaint, that the defendant in error intended to assert a right to recover under the Federal Employers' Liability Act, that claim was abandoned. The amount of damages layed in the complaint is twenty-five thousand ($25,000) dollars. Under the Statute of Minnesota, the amount recoverable at the time this action was instituted, for death by wrongful act, was five thousand ($5,000) dollars. At the time of trial, counsel for defendant in error was asked if he claimed the right to recover under the Federal Employers' Liability Act. He then stated that while the complaint was apparently formed with that idea in view, "the only time we could come clearly under the Federal Liability Act would be if we could show that the dead man himself, at the time he was killed, was engaged in interstate commerce, and we have no evidence in that regard. I do not state that to the jury. That is a question of law for the Court."

While it is undisputed that the cars between which Popplar was injured, were used, when occasion re-

quired, for interstate business, they were not being used at the time Popplar received his injuries, in interstate business; and therefore at that particular time, Popplar was not engaged in interstate commerce, so as to establish a right to recover within the provisions of the Employers' Liability Act. But plaintiff in error, so far as the cars in question are concerned, is subject to the requirements and burdens of the Federal Safety Appliance Act, as held by this Court in *Ill. Central Ry. Co. v. Behrens*, 233 U. S. p. 473.

As already stated, the amendment of the Safety Appliance Act of 1910, rendering the company liable for injuries received by its employees in the movement of a car after a defect occurs in its coupling appliances, does not apply to this case, because Popplar was killed in 1909.

In the case of *Delk against Ry. Co.*, 220 U. S. above referred to, the right of recovery was claimed under the Employers' Liability Act, and in that case this court said at page 587:

> "One other matter requires notice, particularly in view of the decision today in *Schlemmer v. Buffalo, Rochester & Pittsburg Ry. Co.*, in which it is held that under the original Safety Appliance Act, and until that act was amended by that of April 22, 1908, 35 Stat. 65, c. 149, contributory negligence on the part of the party injured, where such negligence was the proximate cause of the injury, was a valid defense for the interstate carrier."

Under the facts in the *Delk* case, we understand this court held where the party injured is at the time he receives his injury, actually engaged in interstate commerce, he is entitled to recovery under the Federal Employers' Liability Act, notwithstanding his own

negligence, because in such a case that act amounts to an amendment of the Federal Safety Appliance Act. The Employers' Liability Act creates a liability and right of recovery in favor of railway employes when actually engaged in interstate commerce, not theretofore existing, and also provides:

"That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any Statute enacted for the safety of employees contributed to the injury or death of such employee."

"Such employee" means an employee engaged at the time he is injured, in interstate commerce. The act, by its terms, limits its application, so far as abolishing contributory negligence, to those employees who at the time of being injured are engaged in interstate commerce, and that when so engaged, if they are injured by reason of the failure of the carrier to comply with any other Federal Statutory requirement, then the right of recovery shall not be denied on account of their own negligence.

This statute abolishes a common law right, and its scope and extent should not be extended beyond the clearly expressed intention of the legislative body. It is a well established rule of construction that a statute abolishing a common law right should be strictly construed. It seems clear that the defense of contributory negligence is abolished in only those cases where recovery is sought and can be allowed under that Act, and has no application to cases like this. That was our claim before the Supreme Court of Minnesota as well as the trial court, and while the Supreme Court of Minnesota sustained our contention, the court did hold that the Safety Appliance Act modi-

fied the common law rule of contributory negligence; and in that respect we claim the Court has committed error.

In construing the rule of the company, which Popplar violated in going in between the cars while moving, the Supreme Court of Minnesota said that "such rule must be construed in connection with the Safety Appliance Act;" and in answering our contention that as soon as Popplar discovered the defect, it was his duty to stop the train and report that fact, and if he failed to do this it was still his duty to stop the train before attempting to make any uncoupling. In other words, the rule absolutely prohibited Popplar from going between the cars while in motion. In answering this contention the Court said: "If the rule contemplates this method, it is clear that the Statute does not." Our claim is that the Statute in no way modifies or changes the rule prohibiting employees from going between cars while in motion, and has no bearing upon the negligence of Popplar in openly violating the written instructions of the Company. The Supreme Court of Minnesota seems to place its decision on this question largely on the case of *Grand Trunk Ry. Co. against Lindsay*, 233 U. S. p. 42. As already pointed out, in the Lindsay case it appears that when Lindsay discovered the defect in the coupling appliance, it was still a part of his duty to go between the cars and either repair or discover the defect in the coupling appliance. That is not so in this case. The undisputed testimony in this case is that as soon as Popplar discovered that the coupling appliance would not work, it was his duty to stop the train and report the fact. (See Fol. 55 of the record.) Under such conditions, the Safety Appliance Act can in no way change or effect this rule, nor should it be used as an excuse for Popp-

lar's violation of this rule, so as to relieve him from contributory negligence. The Supreme Court of Minnesota placed its decision in construing this rule, and its violation by Popplar, entirely on the ground that the Safety Appliance Act in some way modifies or changes not only the rule itself, but Popplar's action so far as his own negligence is concerned, in violating that rule. This, we claim, is error.

IV.

JURISDICTION.

Since the completion of our brief, we have received a copy of the brief of defendant in error, and find that a large part of that brief is devoted to the question of jurisdiction. On page 8 of the brief, counsel for defendant in error, states:

"At no time during the trial, as appears from the record, did plaintiff in error specially or otherwise set up any right under the Safety Appliance Act of Congress."

The defendant in error alleged and claimed the right to recover by reason of a violation of the Federal Safety Appliance Act by plaintiff in error. Plaintiff in error denied such violation and right to recover. This puts squarely in issue a Federal question. As already pointed out, the complaint alleges that plaintiff in error is engaged in interstate commerce, and that the two cars between which Popplar stepped when he received his injuries, were cars used on various occasions in its interstate business. This is admitted. The complaint further alleges that the coupling appliance on said cars was in a defective condition. It is true the complaint, in so many words, does not

allege that the coupling appliance on these cars did not comply with the requirements of the Safety Appliance Act, by referring in terms to that act, but such reference is not necessary, as held by this court in *Grand Trunk Ry. Co. against Lindsay*, 233 U. S. p. 42 (See page 48).

The trial court in its charge to the jury, said:

> "The action is based on a charge of negligence, and the negligence alleged and claimed consists, if at all, in the failure to have the cars which were in use at that time equipped with automatic couplers, as required by the federal statute, which will couple upon impact and which may be uncoupled without the necessity of a man going between the ends of the cars."

(See Fol. 89 of the record.) So that the direct issue in this case was whether or not there had been any failure on the part of plaintiff in error to comply with the requirements of the Federal Safety Appliance Act.

Plaintiff in error objected to the submission of the case to the jury on the ground that there had been no such violation, and excepted to such ruling by its motion, both for a directed verdict and judgment notwithstanding the verdict, and for a new trial on the ground that the evidence failed to establish any such violation of the Safety Appliance Act, and consequently failed to establish any negligence on the part of plaintiff in error, and also upon the ground of contributory negligence on the part of Popplar. Both the trial court and the Supreme Court held that it was a question for the jury as to whether or not there had been any violation of the Safety Appliance Act, and also as to whether or not Popplar's violation of the written instructions was negligence *per se* when construed in connection with the Federal Act.

We have already referred to those sections of the decision of the Supreme Court of Minnesota in which they both construed and applied the Federal Safety Appliance Act against the claim of the plaintiff in error. In *St. Louis & Iron Mtn. Ry. Co. v. McWhither*, 229 U. S. p. 265, the court said:

> "While it is true, as we have said, that coming from a state court the power to review is controlled by Rev. Stat., § 709, yet where in a controversy of a purely Federal character the claim is made and denied that there was no evidence tending to show liability under the Federal law, such ruling, when duly excepted to, is reviewable, because inherently involving the operation and effect of the Federal law. *Kansas City So. Ry. v. Albers Commission Co.*, 223 U. S. 573, 591; *Creswill v. Knights of Pythias*, 225 U. S. 246."

At the close of the testimony offered by defendant in error, plaintiff in error moved for a dismissal of the case upon three grounds, namely, that plaintiff had failed to establish any cause of action under the pleadings, and that the testimony failed to establish any negligence on the part of the defendant, which was the proximate cause of the injuries, and upon the ground that the testimony conclusively established negligence on the part of plaintiff. (See Fol. 31 of the record.)

This motion was denied and exception entered. At the close of the case, a similar motion was made and exception entered. (See Fol. 88 of the record.) Following the rendition of the verdict, a motion for judgment notwithstanding the verdict, and in case that was denied, a motion for a new trial was made, on the grounds specified and found at Fol. 100 of the record. This alternative motion was denied, exception entered

and appeal taken to the Supreme Court on errors assigned and found at Fols. 109 and 110 of the record. In each case plaintiff in error raised the question of the sufficiency of the testimony to establish negligence, in failing to have a coupling appliance as required by the Federal Statute, which was the sole issue of negligence relied upon by defendant in error, as shown by the charge of the trial court. Plaintiff in error also raised the question of the negligence of Popplar under each of these assignments and asserted that the Federal Safety Appliance Act in no way modified or took away that defense.

Under the practice in Minnesota, the grounds stated in the motions made by plaintiff in error, as well as the assignments of error, raised an issue for consideration by the court. This action being based upon the charge of a violation by plaintiff in error of the Safety Appliance Act, it cannot more clearly set forth its claims than stated in the motions and assignments above referred to. It would have been mere surplusage to have added the statement that the evidence failed to establish any violation of the Safety Appliance Act. The sole issue of negligence, as stated by the trial court in that portion of its charge above referred to, shows that was the only negligence considered by the court and submitted to the jury. This ruling, together with the objection by plaintiff in error, to the sufficiency of the testimony to establish any such claim, was put in issue at every step of the proceeding by plaintiff in error. Counsel for defendant in error in his brief before the Supreme Court of Minnesota, stated in subdivision four, as follows:

> "DEFENSE OF CONTRIBUTORY NEGLIGENCE NOT AVAILABLE IN ANY EVENT. The Safety Appliance Act of Congress contains

no provision as to contributory negligence, although it abolishes the doctrine of assumption of risk. But the Employers' Liability Act, passed in 1908, abolishes the defense of contributory negligence in all cases where the accident or death was caused or contributed to by failure on the part of the defendant to conform to the provisions of statutes enacted, for the safety of employes. A strict construction of that provision would make it applicable only to servants so injured or killed while actually engaged in interstate commerce work. But such strict construction is not necessary nor warranted.

"The Supreme Court of the United States, in *Delk v. Ry. Co.*, 220 U. S. 580, 587, speaks of that provision as an amendment to the Safety Appliance Act, abolishing the defense of contributory negligence. It plainly was the intent and purpose of congress to abolish that defense as to all servants, in so far as Congress had the constitutional power so to act. It has been held in the Delk and other cases that it had the power to establish the defense of assumption of risk as to all servants, whether such servants were intrastate or interstate. Hence, it had the same power as to the defense of contributory negligence. When the Employers' Liability Act was passed, Congress, no doubt, entertained the opinion that was entertained by many of the courts, that the Federal Safety Appliance Act did not apply to intrastate cars and for that reason did not use language technically broad enough to include intrastate servants. But the purpose of the statute should be carried out by the courts in interpreting the same and that can be done without violating the meaning of the language, by extending the same to intrastate servants injured through failure to comply with the Safety Appliance Act."

The plaintiff in error controverted this claim and while the Supreme Court of Minnesota sustained its

contention in that regard, in so far as holding that the defense of contributory negligence was still open to plaintiff in error under the Safety Appliance Act, where the employee, at the time of being injured, was not actually engaged in interstate commerce, the court did hold against plaintiff in error's contention that that act in no way modified or changed the common law doctrine of contributory negligence. Under these contentions, we do not see how it can be rightfully claimed that no right, privilege or immunity is claimed under a Statute of the United States and that the decision is against such right, privilege or immunity specially set up *or claimed* by plaintiff in error.

This case is of great importance, not on account of the amount involved, but because its decision will necessarily have a far-reaching effect, for the reason that railway companies cannot comply with the provisions of the Safety Appliance Act unless their employees observe and carry out the written instructions, the violation of which it is claimed in this case, was the sole and proximate cause of the injuries complained of.

We respectfully submit that the judgment appealed from should be reversed.

M. D. MUNN,
Solicitor for Plaintiff in Error.

A. H. BRIGHT,
J. L. ERDALL,
Of Counsel.

Supreme Court of the United States.

OCTOBER TERM, 1914.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY,

Plaintiff in Error,

vs.

MICHAEL A. POPPLAR, as Administrator of the Estate of RICHARD S. POPPLAR, Deceased,

Defendant in Error.

BRIEF ON BEHALF OF DEFENDANT IN ERROR.

STATEMENT OF FACTS.

This action was brought in the District Court of Ramsey County, Minnesota, to recover damages on account of death by wrongful act. It was alleged in the complaint, and admitted, that the plaintiff in error was engaged in interstate com-

merce by railroad, and that the railroad yard at Mahnomen, Minnesota, in which the accident occurred, constituted a part of such interstate railroad system.

The case was tried and submitted to the jury solely upon the question as to whether or not a coupler on one of the cars being switched at the time of the accident was defective and in such a condition that the cars could not be uncoupled without the necessity of the deceased going between for such purpose. That was the sole claim alleged and set forth in the complaint, with the exception of certain allegations as to a defect in the track, which allegations were abandoned at the trial. The complaint alleged the defective coupler as the cause of the accident, necessitating the deceased going between the cars to uncouple. The plaintiff in error, by its answer, put in a general denial, and, also, affirmatively alleged assumption of risk and contributory negligence.

Trial was had, and the testimony for the defendant in error was to the effect that, at Mahnomen, Minnesota, the engine, with which deceased was working, was backing along one of the tracks in the yard, pushing two freight cars, the plan being to uncouple the rear car while the train was in motion, the operation being designated as a "kicking" or "shunting" operation (pages 10, 11 of record). The deceased was making the uncoupling. While walking along the side of the train, moving about 4 miles per hour, he took hold of the pin lifter handle at the corner of the car, this being the

only uncoupling device on his side of the train, and attempted, three or four times to lift the pin and uncouple, but failed. Thereupon he necessarily stepped between the cars and pulled the pin on the other car by hand, and at about the same time stumbled and fell and was run over and killed (pages 11, 13, of record).

Kornell, witness for the defendant in error, was with the deceased at the time of the accident (page 13 of record). He testified as to the actions of the deceased, and that the coupler was in such condition that it could not be worked or operated or uncoupled by means of the pin lifter (pages 13, 14 of record).

The trial court submitted to the jury the two issues, first, was the coupler in question in such condition or so defective that it could not be operated from the outside of the train and without the necessity of going between the cars; second, was the deceased himself chargeable with contributory negligence per se, and, particularly, on account of violation of a printed rule of the plaintiff in error forbidding him or anyone going between moving cars. Both issues were decided in favor of the defendant in error.

At the close of the testimony offered by the defendant in error, the plaintiff in error moved for a dismissal, and, at the close of all the evidence, moved for a directed verdict, and, afterwards, moved for a new trial, all three motions being based upon the same grounds, namely, first, that the defendant in error had failed to establish any

cause of action under the pleadings, second, that the testimony failed to establish any negligence on the part of the plaintiff in error, which was the proximate cause of the accident complained of, and, third, that the testimony established negligence per se on the part of the deceased. The motions all being denied, an appeal was taken to the Supreme Court of the State of Minnesota, which affirmed the orders of the trial court. This appeal was taken from a final judgment afterwards entered.

ARGUMENT.

THIS COURT CANNOT TAKE JURISDICTION OF THIS CASE BECAUSE IT NOWHERE APPEARS IN THE RECORD THAT ANY FEDERAL QUESTION WAS RAISED.

This is an appeal from a final judgment in the Supreme Court of the State of Minnesota. It is essential to the jurisdiction of this Court over such judgment that one of the questions mentioned in Section 709 Revised Statutes must have been raised and presented to the State court. Under the laws and practice in the State of Minnesota, no question can or will be considered in the Supreme Court, which was not raised and passed upon in the trial court.

Hawke v. Banning, 3 Minn. 67 (G. 30).

Babcock v. Sanborn, 3 Minn. 141 (G. 86).

Roach v. Aetna Insurance Company, 108 Minn. 127.

State ex rel Pope v. Germania Bank, 103 Minn. 129.

Hence, it was essential that such Federal question be distinctly raised, presented and decided in the trial court, and it must appear that such decision was against the right claimed or asserted by the plaintiff in error, or it must appear that its decision was necessary to the judgment rendered.

Murdock v. Memphis, 20 Wall. 635.

Concededly there was not drawn in question the validity of any federal or state statute. Was there any title, right, privilege, or immunity set up or claimed under the Safety Appliance Act of Congress, which is the only statute involved in this case, and, if so, was the decision against such title, right, privilege, or immunity specially set up or claimed by the plaintiff in error? If not, then this appeal must be dismissed for want of jurisdiction.

See Seaboard Air Line Railway v. Duvall, 225 U. S. 477.

The Safety Appliance Act was not specifically referred to in the pleadings. The complaint is so formulated as to indicate clearly that, if there was a defective or unworkable coupler, there would be a violation of the Safety Appliance Act of Congress, rather than a violation of the Safety Appliance Act of Minnesota, for the reason that the act of Congress applies to all cars used upon an interstate road without regard to whether or not such cars were at the time being used in moving interstate commerce or traffic.

Southern Railway Company v. United States, 222 U. S. 20.

The only witness testifying for the defendant in error as to the cause of the accident was John S. Kornell, whose testimony is found on pages 8-17 of the record, he testifying simply that the deceased had charge of the switching operation at the time and place in question (page 10 of record); that the

deceased attempted three or four times to uncouple with the pin lifter, and that he could not uncouple the cars (page 13 of record); that he thereupon went between the cars and pulled the pin on the other car (page 13 of record); that he then heard him call out and saw him under the wheels (page 13 of record); that the train was then moving about four miles per hour (page 13 of record); that he shortly afterwards tried and tested the coupler in question and found that it could not be uncoupled or opened by the pin lifter (page 14 of record).

At the close of the evidence for defendant in error, the plaintiff in error moved for a dismissal, which motion was denied. We have already stated the grounds of that motion.

Thereupon the plaintiff in error introduced evidence directed to the proposition that the coupler in question was in workable condition. One witness, Duncan Leach, testifying for the plaintiff in error, admitted that the coupler worked hard, some three or four hours later, at which time it was not coupled to any other car (page 27 of record); that the proper time to uncouple is when the slack is pushed in, as when the train is backing (page 33 of the record), which was the position the train was in, when the deceased attempted to uncouple. Leach also testified that it was much easier to pull a pin when the cars are standing and not coupled (page 34 of record). Also that he, as conductor, would have reported this coupler as a bad coupler (pages 34, 35 of record).

The only other testimony offered on the issues in the case was evidence of a printed rule forbidding deceased or anyone going between moving cars. Upon that, the plaintiff in error claims that the contributory negligence of the deceased had been established as a matter of law.

We have already pointed out that no additional grounds were referred to in the motion for a directed verdict or in the motion for a new trial.

At no time during the trial, as appears from the record, did plaintiff in error, specially or otherwise, set up any right under the Safety Appliance Act of Congress. On the contrary, it simply claimed that there was no defect in the coupler in question, and that it did not work properly, and that, in any event, the deceased had no right to go between the cars, either under the printed rule or at all. Hence, aside from the assertion that the coupler worked properly, the only claim was that the deceased was guilty of contributory negligence in going between the cars. Such an assertion did not call for any construction of the Safety Appliance Act so as to raise any Federal question.

Seaboard Air Line Railway v. Duvall, supra.

The Supreme Court of Minnesota, in the opinion, stated that it held, following the decisions of this Court, that the Safety Appliance Act imposed an absolute continuous duty upon a railroad, on a highway of interstate commerce, to have the couplers so that, when operated in an ordinary and reasonable manner, the cars can be uncoupled

without requiring the operator to go between the cars. In other words, the Supreme Court of Minnesota simply recognized and followed the well settled rule established by this Court.

See Chicago, Burlington & Quincy Ry. Co. v. United States, 220 U. S. 559.

St. Louis I. M. & S. Ry. Co. v. Taylor, 210 U. S. 281.

Southern Railway Company v. United States, 222 U. S. 20.

While it may be true that a contention by a railway company engaged in interstate commerce, that the duty imposed by the statute is not absolute, and that proof of exercise of reasonable care would constitute a defense may have been sufficient to have raised a Federal question, it is no longer true, since this Court has settled that question contrary to any such contention.

But the plaintiff in error did not attempt to raise any such question. Its sole contention consisted in this, that the coupler was in workable condition in fact, coupled with the claim that the deceased was chargeable with contributory negligence per se, in any event. It is clear that a federal question cannot be raised simply by virtue of a controversy as to the force and effect of evidence bearing upon the actual condition of a coupler. That is a mere question of fact. That question was fairly presented and decided against the plaintiff in error. Clearly that does not raise a federal question.

Nor does the mere fact that it appears in the certificate that a right was set up under a federal law and denied give this Court jurisdiction, for the certificate is not evidence of the fact that a federal question was raised.

Seaboard Air Line Railway v. Duvall, supra.

Hence, it is submitted that this Court has no jurisdiction and that, therefore, this appeal must be dismissed.

THE TESTIMONY IN THE RECORD DISCLOSES THAT THE COUPLER IN QUESTION WAS NOT IN CONFORMITY WITH THE PROVISIONS OF THE SAFETY APPLIANCE ACT.

The evidence on this point is brief and clear. Kornell, after stating that the engine was running backward at a speed of about four miles per hour, pushing, as he said, three or four cars, as the evidence elsewhere indicates, two cars, and, after reciting that he and the deceased were moving along with the train at the point where the car was to be uncoupled, he states, on page 13 of the record, that he saw the deceased try the pin lifter lever three or four times, and that he could not pull it, meaning could not uncouple. The train was then in the backward motion, and the cars, therefore, in a favorable and proper position for uncoupling (page 33 of record). He then states that the deceased went in between the cars and pulled the pin on the other car (page 13 of record). Concededly, the only pin lifting bar on the side on which the deceased was working was the one which could not

be operated. Kornell then testified that, shortly after the accident, he went to the cars and tried to pull the pin on the coupler in question and open the knuckle, and that he could not open it; that he tried to pull the pin with his hands, and that he put his fingers underneath the block and, after trying, could not raise it high enough to open the knuckle and uncouple (page 14 of the record).

A witness for the plaintiff in error, Duncan Leach, conductor of the train, testified that some four hours later, when the two cars were uncoupled, he tried the coupler in question, using the pin lifter bar, and that he could raise the pin, but that it worked hard or somewhat stiff (page 27 of record); and that he, as conductor, would have reported the coupler as a bad coupler (pages 34, 35 of record), although he claims on redirect examination that he would not call it a defective coupler, saying that to be defective something must be broken, in his opinion.

Clearly nothing more was necessary to establish the fact that the coupler was defective, out of order, and not in compliance with the Safety Appliance Act of Congress.

Chicago, R. I. & P. Ry. Co. v. Brown, 229 U. S. 317.

Chicago, B. & Q. Ry. Co. v. United States, 220 U. S. 559.

St. Louis, I. M. & S. Ry. Co. v. Taylor, 210 U. S. 281.

Delk v. St. Louis & S. F. R. R. Co., 220 U. S. 580.

The Supreme Court of the State of Minnesota has consistently followed these rulings.

Slaughter v. I. C. R. R. Co., 125 Minn. 96.

Willett v. Ry. Co., 122 Minn. 513.

It may be claimed by the plaintiff in error that, aside from the printed rule, the deceased was chargeable with negligence in going between the cars to uncouple the other coupler in place of stopping the train and then going between or going around on the other side It seems to contend that to do so would have been a simple matter, and particularly a simple matter to go to the other side of the train on account of the fact that the train consisted of only two cars. The best answer to make to this contention is to quote the language of this Court from the Brown case, supra, as found on page 321. There this Court says:

> "The railway company starts its contentions with a concession of its own culpability in sending Brown to his duty to encounter defective appliances, and then seeks to relieve itself from liability by a charge against him of a careless judgment in its execution. But some judgment was necessary, and whether he should have selected one of the ways which counsel points out admits of debate.
>
> It is one thing to judge of a situation in cold abstraction; another thing to form a judgment on the spot. * * * The movement of trains requires prompt action, and we cannot hold that, as a matter of law, Brown, in leaning forward to remove a pin which would have yielded to his effort, was guilty of negligence because he did not anticipate that his foot might slip and be caught in an open frog rail of which he had or could be charged with knowledge."

In the case at bar the switching operation being carried on was designated as a "kick" or "shunt" of a car, which is done by getting the requisite speed and then uncoupling the car and stopping the rest of the train, and permitting the car by its own momentum to go to its destination (page 31 of record). It is a common and essential operation in railroading (page 31 of record). It is a quick operation (page 31 of record). The stop signal is generally given at about the time the pin is pulled (page 32 of record). Leach, as conductor, testifying for the plaintiff in error, was asked these questions and gave these answers on page 33 of the record:

> "Q. When you are making a kick, the purpose and intent is to uncouple and do it quick, so the train or cars will run away, isn't it?
> A. Yes, sir.
> Q. And generally when you are doing switching operations you are working rapidly, aren't you?
> A. Why, generally, yes, sir.
> Q. And particularly when you are making up a train, I mean?
> A. Yes, sir."

The deceased was engaged at the time in making up a train (page 9 of record). This same witness testified that he could conceive of no reason for a man going between the cars excepting that the other pin lifter would not work.

Hence, the testimony shows clearly that the work being done at the time, if completed, and the purpose carried out, must be done by the deceased pulling the pin and uncoupling the cars while they

were in motion. He could not do it on account of the defective coupler. The only other thing for him to do, unless he should be required to abandon the operation designed, was to step between the cars, as he did. Clearly he cannot be charged with contributory negligence as a matter of law.

But the plaintiff in error contends that he was so chargeable with contributory negligence because he violated a printed rule forbidding going between the cars while in motion. But, the language of this Court quoted above from the Brown case, is a sufficient answer to this contention.

See also Seaboard Air Line Railway v. Duvall, 225 U. S. 477.

In the last cited case there was a printed rule which it is claimed was violated. But this Court held that it was a question of fact for the jury.

The decision of the Supreme Court of the State of Minnesota on this question would seem to be logical and unanswerable.

See Popplar v. Minneapolis, etc., Ry. Co., 121 Minn. 413.

But, whatever may be the view of this Court as to the proper construction of the rule and the force and effect to be given thereto, the question as to whether or not the deceased was guilty of contributory negligence is not in any sense a federal question and connot be reviewed by this Court.

We respectfully submit that this appeal should be dismissed for want of jurisdiction, and, if not,

that, in any event, the decision of the Supreme Court of the State of Minnesota should be affirmed.

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MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY *v.* POPPLAR, ADMINISTRATOR.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 223. Submitted April 14, 1915.—Decided April 26, 1915.

In this case the court finds no ground for reversal in the ruling of the trial court that there was enough to go to the jury upon the question whether in fact the appliance complained of was defective.

Where the power of this court to review the judgment is controlled by § 237, Judicial Code, questions non-Federal in character may not be considered, nor can this court pass on whether a rule of the carrier was or was not disobeyed in a case dependent upon the Safety Appliance Act.

The defense of contributory negligence is not dealt with by the Safety Appliance Act.

121 Minnesota, 1413, affirmed.

THE facts, which involve the validity of a judgment of the state court for damages for personal injuries, are stated in the opinion.

Mr. M. D. Munn, with whom *Mr. A. H. Bright* and *Mr. J. L. Erdall* were on the brief, for plaintiff in error.

Mr. Samuel A. Anderson for defendant in error.

Memorandum opinion by direction of the court, by MR. JUSTICE HUGHES.

This action was brought in the state court by an administrator to recover damages for an injury causing the death of the intestate. The injury was received, September 6, 1909, by the decedent, a brakeman, while he was un-

coupling a car which was being 'kicked' to a siding, and recovery was sought because of noncompliance with the Federal Safety Appliance Act, c. 196, 27 Stat. 531; c. 976, 32 Stat. 943. Upon the trial a motion was made for a direction of a verdict upon the grounds that the evidence failed to show neglect on the part of the Railroad Company and did establish contributory negligence. Apart from the exception to the denial of this motion, there were no exceptions to the instructions given to the jury. There was a finding for the plaintiff and the Railroad Company moved for judgment notwithstanding the verdict, or for a new trial; the motions were denied. The Supreme Court of the State affirmed the judgment. 121 Minnesota, 413.

There was testimony that the decedent, on giving the stop signal, attempted to uncouple the 'head car' that was to be left to run of its own momentum on the siding; he tried repeatedly to do this by pulling the coupling pin with the lifter at the end of the next car, but without success, and then, stepping between the two cars, while they were moving at the rate of about four miles an hour, in order to effect the uncoupling by hand, he was run over and killed. The conductor, a witness for the Company, who examined the coupling apparatus soon after the accident, testified that it worked with difficulty and that he would have reported it as a 'bad coupler' had it been brought to his attention. Without going into the evidence in detail, it is sufficient to say that we find no ground for reversal in the ruling that there was enough to go to the jury upon the question whether, in fact, the coupler was defective. See *Seaboard Air Line Railway* v. *Padgett*, 236 U. S. 668.

It is urged that the right of recovery was barred by reason of the fact that the decedent disobeyed a rule of the Company which forbade him from going between moving cars. The state court held that the jury might find

that a practical necessity existed for the disobedience of this rule and that the course which the decedent followed in the emergency was that of a reasonably prudent man. Our power to review the judgment is controlled by § 237 of the Judicial Code (Rev. Stat., 709) and we may not consider questions which are not Federal in character. *St. Louis & Iron Mountain Rwy. Co.* v. *Taylor*, 210 U. S. 281, 291; *Seaboard Air Line Railway* v. *Duvall*, 225 U. S. 477, 487; *Seaboard Air Line Railway* v. *Padgett*, 236 U. S. 668. In the present case a Federal question could arise only under the Safety Appliance Act; while the cars were upon a railroad which was a highway of interstate commerce and hence this Act was applicable (*Southern Railway Co.* v. *United States*, 222 U. S. 20), it is agreed that there was no evidence that the decedent at the time of the accident was engaged in interstate commerce and no question is presented under the Employers' Liability Act,—an enactment which has a wider field. It is apparent that the ruling referred to does not involve the construction of the Federal statute or any right, or immunity from liability, which is thereby conferred. The question is *dehors* the statute. True, the state court said that the rule of the Company should be construed in connection with the Safety Appliance Act, but, as the context shows, the court remarked this in pointing out that the statute was designed to prevent the necessity of going between the cars for the purpose of uncoupling them, whether they were standing or moving, and that the only way in which the decedent could uncouple the cars without going between them was to stop the train and walk around to the pin lifter on the other side. In the light of the testimony, the court concluded that it could not be said as matter of law that the decedent in the circumstances was bound to do this. The statute was concerned only in so far as it defined the duty of the Company to have couplers meeting the positive requirement; it did not preclude the defense of contributory

negligence, as distinguished from that of assumption of risk. As this court has said,—'The defense of contributory negligence was not dealt with by the statute.' *Schlemmer* v. *Buffalo, Rochester & Pittsburg Rwy. Co.*, 220 U. S. 590, 595. Whether the rule of the Company applied in such an emergency as that in which the decedent found himself,—whether he was guilty of contributory negligence as matter of law, or could be excused upon the ground that in an exceptional situation he acted with reasonable care, were questions which the Federal act left untouched.

The action fell within the familiar category of cases involving the duty of a master to his servant. This duty is defined by the common law, except as it may be modified by legislation. The Federal statute, in the present case, touched the duty of the master at a single point and, save as provided in the statute, the right of the plaintiff to recover was left to be determined by the law of the State. It cannot be said, from any point of view, that any right or immunity granted by the Act was denied to the plaintiff in error.

Judgment affirmed.